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THE LAW

OF

INSTRUCTIONS TO JURIES

IN

CIVIL AND CRIMINAL ACTIONS

AND

APPROVED FORMS

WITH REFERENCES TO ANALOGOUS PRECEDENTS

BY

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PREFACE

The author of this volume has endeavored to present to the legal profession a useful and handy work on the law of instructions, with its subject matter and the forms conveniently arranged for ready reference.

In the first division of the book the rules and principles of the common law and under statutory enactment, which govern the preparation and presentation, and the giving and refusing of instructions, have been collected and classified.

The second division of this work, it will be observed, presents a body of forms of instructions for both civil and criminal cases, classified and arranged in chapters. These forms, with few exceptions, have been approved by the courts of last resort.

No attempt has been made to encumber the pages with needless duplications of "stock instructions," inasmuch as such repetition answers no useful purpose in a work designed for general practice.

The law is presented as found in an exhaustive review of the law reports. The subject matter has been arranged in that order which the experience of an active practice for nearly a quarter of a century has suggested as rendering the material most accessible.

C. H.

Chicago, Illinois,
March 20, 1905.

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THE LAW OF INSTRUCTIONS.

CHAPTER I.

PURPOSE AND PREPARATION.

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§ 1. **Object and office of instructions.**—The object of instructions is to inform the jury what are the precise principles or rules of law applicable to the evidence in the case,[1] and to explain the issues that the jury may have a clear understanding of their duty in reaching a verdict.[2] Instructions should therefore be clear and simple, and consist of a plain statement of the law applicable to the evidence or facts in the case; and they should be couched in such terms that they may be readily understood by ordinary men acting as jurors.[3]

The instructions given should not only be correct, but so explicit as not to be misleading or misconstrued.[4] In other words the instructions given should be in plain English, and should avoid as far as posible the use of technical terms.[5] The safer course is to draw them in the language of the approved and well settled forms;[6] and each party should see that his own instructions are properly drawn.[7]

§ 2. **Propriety of giving instructions.**—The propriety of giving or refusing instructions must always be determined by the facts in the particular case. Hence it frequently happens that an instruction may be entirely proper in one case and erroneous in another, although the two cases may be similar in many respects; but a different element may be found in one not entering into the other which would require the giving of different instructions in the two cases.[8]

[1] Montag v. P. 141 Ill. 81, 30 N. E. 337; Lehman v. Hawks, 121 Ind. 541, 23 N. E. 670; Lander v. P. 104 Ill. 248; Dodd v. Moore, 91 Ind. 523; McCallister v. Mount, 73 Ind. 567; Thork v. Goewy, 85 Ill. 616; Chicago & A. R. Co. v. Murray, 62 Ill. 326, 331; S. v. Stout, 49 Ohio St. 282, 30 N. E. 437; Crane Co. v. Tierney, 175 Ill. 82, 51 N. E. 715; Chicago, &c. A. R. Co. v. Utley, 38 Ill. 411; Baxter v. P. 3 Gilm. (Ill.) 381; Morse v. Ryland, 58 Kas. 250.

[2] Illinois Cent. R. Co. v. King, 179 Ill. 96, 53 N. E. 552; North Chicago St. R. Co. v. Polkey, 203 Ill. 232.

[3] Armour v. Brazeau, 191 Ill. 124, 60 N. E. 904; City of Freeport v. Isbell, 83 Ill. 440; Herrick v. Gary, 83 Ill. 86; Illinois C. R. Co. v. Hammer, 72 Ill. 347; Tresh v. Newell, 62 Ill. 196, 202; Peri v. P. 65 Ill. 26; Smith v. City of Sioux City (Iowa) 93 N. W. 81. See generally: Hyde v. Shank, 77 Mich. 517, 43 N. W. 890; Trinity & S. R. Co. v. Schofield, 72 Tex. 496, 10 S. W. 575; Loeb v. Weis, 64 Ind. 285; Goffney v. St. Paul City R. Co. 81 Minn. 459; Parmlee v. Adolk, 28 Ohio St. 13; Aikin v. Weckerly, 19 Mich. 482; Parrish v. S. 14 Neb. 60, 15 N. W. 357.

[4] Ætna Ins. Co. v. Reed, 33 Ohio St. 295, 31 Am. R. 539; Little M. R. Co. v. Wetmore, 19 Ohio St. 134.

[5] Chappell v. Allen, 38 Mo. 213, 222.

[6] Lawless v. S. 4 Lea (Tenn.) 179; S. v. Murray, 91 Mo. 95, 3 S. W. 397.

[7] Denman v. Bloomer, 11 Ill. 193.

[8] Lamb v. P. 96 Ill. 84; Leavitte v. Randolph County, 85 Ill. 507.

§ 3. **Court instructing of its own motion.**—The court undoubtedly has the right to instruct the jury on its own motion; and it may be added that it is the duty of the court to do so when the promotion of justice demands it.[9] In some of the states the court is required to instruct the jury on its own motion upon the general features of the law which control the substantial issues whether requested to do so or not;[10] but in some jurisdictions this requirement applies to criminal cases only.[11]

In Arkansas and Missouri the court is not required to instruct on its own motion in civil cases.[12] Under the practice in Texas the court must instruct the jury in felony cases whether requested or not.[13]

§ 4. **Written instructions required.**—A statute requiring that all instructions to the jury shall be given in writing is mandatory;[14] and the failure of the court to reduce the instructions

[9] Roy v. Goings, 112 Ill. 667; City of Chicago v. Keefe, 114 Ill. 230, 2 N. E. 267, 55 Am. R. 860; O'Reily v. Fitzgerald, 40 Ill. 310; Stumps v. Kelly, 22 Ill. 140; Galena C. & N. R. Co. v. Jacobs, 20 Ill. 478; Driver v. S. 37 Tex. Cr. App. 160, 38 S. W. 1020; Gwatkin v. Com. 9 Leigh (Va.) 678, 33 Am. Dec. 264; see also Viser v. Bertrand, 14 Ark. 267; Hanchette v. Kimbark, 118 Ill. 132, 7 N. E. 491; Brown v. P. 9 Ill. (4 Gilm.) 439; S. v. Pierce, 8 Nev. 291; Thistle v. Frostburg Coal Co. 10 Md. 129; Bunnell v. Greathead, 49 Barb. (N. Y.) 106; Spies v. P. 122 Ill. 244, 12 N. E. 865, 17 N. E. 898.

[10] Welch v. Watts, 9 Ind. 115; Krack v. Wolf, 39 Ind. 88; Strickland v. S. 98 Ga. 84, 25 S. E. 908; Sledge v. S. 99 Ga. 684, 26 S. E. 756. 59 Am. St. 251; Kyd v. Cook, 56 Neb. 71, 76 N. W. 534, 71 Am. St. 661; S. v. Fulford, 124 N. Car. 798, 32 S. E. 377; S. v. Clark, 147 Mo. 20, 47 S. W. 886; Wilson v. Commercial U. Ins. Co. 15 S. Dak. 322, 89 N. W. 649; Ter. v. Baca (N. Mex.), 71 Pac. 460, (in criminal cases); S. v. Anslinger, 171 Mo. 600, 71 S. W. 1041; Donahue v. Windsor Co. M. F. Ins. Co. 56 Vt. 374; P. v. Byrnes, 30 Cal. 206, 89 Am. D. 85; Sanders v. S. 41 Tex. 306; Pryor v. Coggin, 17 Ga. 444; Barton v. Gray, 57 Mich. 622; 24 N. W. 638; S. v. Phipps, 95 Iowa, 487, 64 N. W. 410; Douglass v. Geiler, 32 Kas. 499, 4 Pac. 1039; Heilman v. Com. 84 Ky. 461, 4 Am. St. 207; 1 S. W. 7731. In Indiana the omission to give any instructions is not available error unless instructions were asked and an exception reserved to the court's refusal to give them, Marks v. Jacobs, 76 Ind. 216; Rauch v. State, 110 Ind. 384, 11 N. E. 450.

[11] Potter v. S. 85 Tenn. 88, 1 S. W. 614, 4 Am. St. 744; S. v. Palmer, 88 Mo. 572; Heilman v. Com. 84 Ky. 461, 1 S. W. 731 4 Am. St. 207; P. v. Byrnes, 30 Cal. 206, 89 Am. Dec. 85; P. v. Murray, 72 Mich. 10, 40 N. W. 29.

[12] White v. McCracken, 60 Ark. 619, 31 S. W. 882; Farmer v. Farmer, 129 Mo. 530, 31 S. W. 926, 36 L. R. A. 806.

[13] Miers v. S. 34 Tex. Cr. App. 161, 29 S. W. 1074, 53 Am. St. 705; Moore v. S. (Tex. Cr. App.), 33 S. W. 980; Sanders v. S. 41 Tex. 306; Barbee v. S. 23 Tex. App. 199, 4 S. W. 584; Bishop v. S. 43 Tex. 390; Warren v. S. 33 Tex. Cr. App. 502, 26 S. W. 1082.

[14] Ellis v. P. 159 Ill. 339, 42 N. E. 873; P. v. Beeler, 6 Cal. 246; Helm v. P. 186 Ill. 153, 57 N. E. 886;

to writing when requested by either party is error per se for which the judgment will be reversed.[15] So the giving of oral instructions when requested to instruct in writing, is error.[16]

If it be desirable to modify a written instruction, such modification must be reduced to writing, especially where the court asks counsel to reduce it to writing. The court is not bound to give an oral modification of a written instruction.[17] It follows that the court is not required to regard an oral request where a statute requires that the instructions shall be given in writing.[18] The court is not bound, however, to give written instructions unless requested to do so;[19] but may instruct orally if neither party asks for written instructions.[20] In the absence of a statute the court may instruct the jury either orally or in writing in its discretion.[21]

Where the court is authorized to instruct the jury orally and in writing, it is improper to call their attention to the written

Smaggart v. Ter. (Okla.), 50 Pac. 96; S. v. DeWitt 152 Mo. 76, 53 S. W. 429; S. v. Fisher, 23 Mont. 540, 59 Pac. 919; Murray v. S. (Tex. Cr. App.), 44 S. W. 830; Harvey v. Keegan, 78 Ill. App. 682; S. v. Colter, 15 Kas. 302; City of Atchison v. Jansen, 21 Kas. 560, 48 Kas. 368; Morrison v. S. 42 Fla. 149, 28 So. 97; P. v. Sanford, 43 Cal. 29, 1 Green, Cr. R. 682; Mobile Fruit & T. Co. v. Potter, 78 Minn. 487, 81 N. W. 392; Ray v. Wooters 19 Ill. 81; 68 Am. Dec. 583; Columbia Veneer & Box Co. v. Cottonwood Lumber Co. 99 Tenn. 122, 41 S. W. 351; S. v. Miles, 15 Wash. 534, 46 Pac. 1047; Wettengel v. City of Denver, 20 Colo. 552, 39 Pac. 343; Ehrlick v. S. 44 Neb. 810, 63 N. W. 35; Hopt v. Utah, 104 U. S. 631, 4 Am. Cr. R. 368; Bradway v. Waddell, 95 Ind. 171; Davis v. Foster, 68 Ind. 238; Shafer v. Stinson, 76 Ind. 374; Bosworth v. Barker, 65 Ind. 595; Southerland v. Venard, 34 Ind. 390; Mazzia v. S. 51 Ark. 177, 10 S. W. 257; Blashfield Instructions, § 117; Arnold v. S. (Ark.), 74 S. W. 513.

[15] P. v. Ah Fong, 12 Cal. 345; P. v. Payne, 8 Cal. 341; Traders Deposit Bank v. Henry, 20 Ky. L. R. 1506, 49 S. W. 536; Hardy v. Turney, 9 Ohio St. 400; Stephenson v. S. 110 Ind. 358, 11 N. E. 360, 59 Am. R. 216; Smur v. S. 88 Ind. 504; Jaqua v. Cordesman, 106 Ind. 141, 5 N. E. 907; Head v. Langworthy, 15 Iowa, 235; S. v. Harding, 81 Iowa, 599, 47 N. W. 877; Ellis v. P. 159 Ill. 337, 42 N. E. 873; S. v. Porter, 35 La. Ann. 535; Louisville & N. R. Co. v. Banks (Ky.), 23 S. W. 627.

[16] Householder v. Grandy, 40 Ohio St. 430. See Powers v. Hazelton, &c. L. R. Co. 33 Ohio St. 438; Bosworth v. Barker, 65 Ind. 596; Southerland v. Venard, 34 Ind. 390; Shafer v. Stinson, 76 Ind. 374.

[17] Savannah T. &c. I. R. Co. v. Beasley, 94 Ga. 142, 21 S. E. 285. See Provines v. Heaston, 67 Ind. 482; La Selle v. Wells, 17 Ind. 33, 79 Am. Dec. 453; Lung v. Deal, 16 Ind. 349; Ray v. Wooters, 19 Ill. 82, 68 Am. Dec. 583.

[18] Hacker v. Heiney, 111 Wis. 313, 87 N. W. 249.

[19] Blackburn v. S. 23 Ohio St. 146; Bradford v. P. (Cal.), 43 Pac. 1013; Davis v. Wilson, 11 Kas. 74.

[20] Hopkins v. Dipert, 11 Okla. 630, 69 Pac. 883; Sutherland v. Hankins, 56 Ind. 343; Mutual B. L. I. Co. v. Miller, 39 Ind. 475.

[21] Smith v. Crichton, 33 Md. 103.

instructions and say that they should consider and apply the law as therein set forth as well as in the oral charge, in that it gives undue influence to the written instructions.[22]

§ 5. Oral charge taken down by stenographer.—The giving of oral instructions which are taken down at the time by a stenographer, and extended by him immediately, and as so extended, given to the jury upon their retirement, is not a compliance with the statute.[23]

§ 6. Party must request written instructions.—In the absence of a proper request for instructions a party will not be heard to complain of the failure of the court to instruct the jury.[24] The

[22] Martin v. S. 104 Ala. 71, 16 So. 82, 53 Am. St. 24; Smith v. S. 103 Ala. 40, 16 So. 12.

[23] Crawford v. Brown, 21 Colo. 272, 40 Pac. 692; Shafer v. Stinson, 76 Ind. 374; Rich v. Lappin, 43 Kas. 666; Wheat v. Brown, 3 Kas. App. 431, 43 Pac. 807. Contra: S. v. Preston, 4 Idano, 215, 38 Pac. 694, 95 Am. St. 59. See Union St. R. Co. v. Stone, 54 Kas. 83, 37 Pac. 1012. Ind. Acts, 1903, p. 339, § 1.

[24] McDonall v. P. 168 Ill. 93, 48 N. E. 86; New York Life Ins. Co. v. Brownis' Admr. 23 Ky. L. R. 2070, 66 S. W. 613; American T. & T. Co. v. Kersh 27 Tex. Cv. App. 127, 66 S. W. 74 (as to impeaching testimony); O'Toole v. Post P. Pub. Co. 179 Pa. St. 271, 36 Atl. 288; Smith v. S. 117 Ga. 59, 43 S. E. 703 (as to theory of a party); Lawnsdale v. Grays Harbor Boom Co. 21 Wash. 542, 58 Pac. 663; P. v. Oliveria, 127 Cal. 376; 59 Pac. 772; Wittenberg v. Mollyneaux, 59 Neb. 203, 80 N. W. 824; Boyard v. Johnson (Ky.), 53 S. W. 651; French v. Town of Watterbury, 72 Conn. 435, 44 Atl. 740; Howard v. Turner, 125 N. Car. 126, 34 S. E. 229; Missouri K. & T. R. Co. v. Crowder, (Tex. Cv. App.), 53 S. W. 380; Halff v. Wangemann (Tex. Cv. App.), 54 S. W. 967; Clark v. Clark, 16 Ohio C. C. 103; Bailey v. Carnduff, 14 Colo. App. 169, 59 Pac. 407; Burr v. McCullum, 59 Neb. 326, 80 N. W. 1040, 80 Am. St. 677; Ferguson v. S. 52 Neb. 432, 72 N. W. 590, 66 Am. St. 512 (alibi); S. v. Ridge, 125 N. Car. 655, 34 S. E. 439; Rutherford v. Southern R. Co. 56 S. Car. 446, 35 S. E. 136; Rosenbaum Bros. v. Levitt, 109 Iowa, 292, 80 N. W. 393; Wagener v. Kirven, 56 S. Car. 126, 34 S. E. 18; Bass v. S. 103 Ga. 227, 29 S. E. 966; Lackey v. S. 67 Ark. 416, 53 S. W. 213; Tracey v. Hacket, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. 398; Weber v. Whetstone, 53 Neb. 371, 73 N. W. 695; Boynton v. S. 115 Ga. 587, 41 S. E. 995 (relating to impeachment); Justice v. Gallert, 131 N. Car. 393, 42 S. E. 850; S. v. Donette (Wash.), 71 Pac. 556; Carr v. Frick Coke Co. 170 Pa. St. 62, 32 Atl. 656; Humes v. Gephart, 175 Pa. St. 417, 34 Atl. 790; P. v. McLaughlin, 37 N. Y. S. 1005, 2 App. Div. 419; Hepler v. S. 58 Wis. 49, 16 N. W. 42; Rolling Mill Co. v. Corrigan, 46 Ohio St. 294, 15 Am. St. 596; Brantley v. S. 9 Wyo. 102, 61 Pac. 139; S. v. Chiles, 58 S. Car. 47, 36 S. E. 496; Gruesendorf v. S. (Tex. Cr. App.), 56 S. W. 624; S. v. Todd, 110 Iowa, 631, 82 N. W. 322; Burgess v. S. (Tex. Cr. App.), 42 S. W. 562; Child v. Boyd & Corey Boot & Shoe Mfg. Co. 175 Mass. 493, 56 N. E. 608; Drury v. Connell, 177 Ill. 43, 52 N. E. 368; Horne v. McRea, 53 S. Car. 51, 30 S. E. 701; White v. Cole, 20 Ky. 858, 47 S. W. 759; Waechter v. S. 34 Tex. Cr. App. 297, 30 S. W. 444, 800; see Kostuch v. St. P. City R. Co. 78 Minn. 459, 81 N. W. 215, 47 L. R. A. 136; Lucio v. S. 35 Tex. Cr. App. 320, 33 S. W. 358; Missouri K. & T. R. Co. v.

failure of the court to instruct the jury upon any proposition of law deemed essential cannot be complained of as error unless the complaining party made proper request for instructions.[25]

Hence, if the court fails to instruct on the burden of proof where no instructions in that respect are requested and the attention of the court is not called to the omission, there can be no ground to complain of error.[26] Also an instruction stating

Steinberger, 60 Kas. 856, 55 Pac. 1101; Mineral R. & M. Co. v. Auten, 188 Pa. St. 568, 41 Atl. 327; Parish v. Williams, (Tex. Cv. App.), 53 S. W. 79; Keyes v. City of Cedar Rapids, 107 Iowa, 509, 78 N. W. 227; Rawlins v. S. 40 Fla. 155, 24 So. 65; S. v. Kendall, 54 S. Car. 192, 32 S. E. 300; Chezem v. S. 56 Neb. 496, 76 N. W. 1056; Taylor v. S. 105 Ga. 746, 31 S. E. 764; Barfield v. S. 105 Ga. 491, 30 S. E. 743; Roark v. S. 105 Ga. 736, 32 S. E. 125; S. v. Canceinne, 50 La. Ann. 847, 24 So. 134; Texas & P. R. Co. v. Robinson, 4 Tex. Cv. App. 121, 23 S. W. 433; Miller v. Haas (Tex. Cv. App.), 27 S. W. 263; Lueck v. Heisler, 87 Wis. 644, 58 N. W. 1101; Robinson v. McIlver (Tex. Cv. App.), 23 S. W. 915; Galveston H. & S. A. R. Co. v. McMonigal (Tex. Cv. App.), 25 S. W. 341; Com. v. Washington, 202 Pa. St. 148, 51 Atl. 759; Hall-Moody Institute v. Copass, 108 Tenn. 582, 69 S. W. 327; Jones v. Spartanburg Herald Co. 44 S. Car. 526, 22 S. E. 731; Scully v. S. 39 Ala. 240; Ewing v. Sanford, 19 Ala. 605; Saint v. Guerrerio, 17 Colo. 448, 30 Pac. 335, 31 Am. St. 320; Carpenter v. S. 43 Ind. 371; Moore v. Shields, 121 Ind. 267, 23 N. E. 89; S. v. Helvin, 65 Iowa, 289, 21 N. W. 645; Copas v. Anglo-American Prov. Co. 73 Mich. 541, 41 N. W. 690; Edwards v. S. 47 Miss. 589; Brinser v. Longenecker, 169 Pa. St. 51, 32 Atl. 60; Porath v. S. 90 Wis. 537, 63 N. W. 1061, 48 Am. St. 954; Missouri K. & T. R. Co. v. Miller, 15 Tex. Civ. Ap. 428, 39 S. W. 588; Feinstein v. S. (Tex. Cr. App.), 73 S. W. 1052; Winn v. Sanborn, 10 S. Dak. 642, 75 N. W. 201; Paine v. Incorporated Town, etc. 103 Iowa, 481, 72 N. W. 693; P. v. Winthrop, 118 Cal. 85, 50 Pac. 390; Johnson v. S. 53 Neb. 103, 73 N. W. 463; Driver v. Atchison, T. & S. F. R. Co. 59 Kas. 773, 52 Pac. 79; Patterson v. Mills, 48 N. Y. S. 781 (fellow servant); S. v. Pitts, 156 Mo. 247, 56 S. W. 887; S. v. Rosencrans, 9 N. Dak. 163, 82 N. W. 422; Conway v. Jordan, 110 Iowa, 462, 81 N. W. 703; Pearson v. Spartenberg Co. 51 S. Car. 480, 29 S. E. 193; Chicago G. W. R. Co. v. Healey, 86 Fed. 245; Western U. T. Co. v. Seals (Tex. Cv. App.), 45 S. W. 964; Race v. American F. S. & M. Co. (Tex. Cv. App.), 43 S. W. 36. See Wood v. Collins, 111 Ga. 32, 36 S. E. 423; Dominick v. Randolph, 124 Ala. 557, 27 So. 481; Bowen v. Southern R. Co. 58 S Car. 222, 36 S. E. 590; Jones v. Heirs, 57 S. Car. 427, 35 S. E. 748; Jackson v. International & G. N. R. Co. (Tex. Cv. App.), 57 S. W. 869; Felton v. S. 139 Ind. 531, 39 N. E. 228; P. v. Ezzo, 104 Mich. 341, 62 N. W. 407; S. v. Smith, 65 Conn. 283, 31 Atl. 206 (reasonable doubt); Porath v. S. 90 Wis. 527, 63 N. W. 1061, 48 Am. St. 954 (accomplice corroborated); Carson v. S. 34 Tex. Cr. App. 342, 30 S. W. 799; P. v. Warner, 104 Mich. 337, 62 N. W. 405 (defendant failing to testify.

[25] P. v. Oliveria, 127 Cal. 376, 57 Pac. 772; P. v. Fice, 97 Cal. 460, 32 Pac. 531; S. v. Pfefferle, 36 Kas. 90, 54 Kas. 107; Taft v. Wildman, 15 Ohio, 123; Hills v. Ludaig, 46 Ohio St. 373 24 N. E. 596, 15 Am. St. 608; Georgia S. & F. R. Co. v. Young Ins. Co. (Ga.) 46 S. E. 644; Marks v. Jacobs, 76 Ind. 216.

[26] Lampman v. Van Alstyne, 94 Wis. 417, 69 N. W. 171; Osborne v. Ringland (Iowa), 98 N. W. 116.

that the plaintiff must prove the affirmative issues alleged in his complaint by a preponderance of the evidence is sufficient in the absence of a request for further instructions as to the burden of proof.[27] Also the fact that no instruction was given restricting the jury to the evidence in their deliberations is no ground for error where no instruction in that respect was requested.[28]

On the same principle a defective instruction as to the definition of negligence cannot be the basis of error in the absence of a request for a better instruction.[29] Thus an instruction which states that by the term "negligence" is meant the omission or failure to do something which an ordinarily prudent and careful person would have done under like circumstances, cannot be objected to for not including the doing of an affirmative act where no request is made for a further charge to that effect.[30]

So also the giving of an instruction for one party containing terms or expressions which perhaps ought to be explained, cannot be complained of as error if the party complaining fails to request instructions explaining such terms or expressions.[31] Thus, where an instruction contains the expression "subsidiary facts," "evidentiary facts" or "essential elements of the crime charged," if the opposing party desires these or other such terms explained he should prepare and request instructions explaining them, else he will not be heard to complain of error.[32] And in a murder case the failure of the court, in defining the crime of murder, to charge that the slayer must have been of sound mind cannot be urged as error, no request having been made for such in-

[27] Nichol v. Laumeister, 102 Cal. 658, 36 Pac. 925. See Gottstein v. Seattle L. & C. Co. 7 Wash. 424, 35 Pac. 133.

[28] Mutual Life Ins. Co. v. Baker, 10 Tex. Cv. App. 515, 31 S. W. 1072.

[29] Milligan v. Texas & N. O. R. Co. 27 Tex. Cv. App. 600, 66 S. W. 896; Myer v. Milwaukee E. R. Co. (Wis.), 93 N. W. 6; International & G. N. R. Co. v. Clark (Tex. Cv. App.), 71 S. W. 585.

[30] Campbell v. Warner (Tex. Cv. App.), 24 S. W. 703; Stauning v. Great N. R. Co. 88 Minn. 480, 93 N. W. 518; Lane v. Missouri Pac. R. Co. 132 Mo. 4, 33 S. W. 645, 1128 (contributory negligence). See also Magoon v. Before, 73 Vt. 231, 50 Atl. 1070; Smith v. South Carolina & G. R. 62 S. Car. 322, 40 S. E. 665.

[31] Hinshaw v. S. 147 Ind. 335, 47 N. E. 157; Western U. Tel. Co. v. Giffin (Tex. Cv. App.), 65 S. W. 661; Kelly v. Cable Co. 7 Mont. 70, 14 Pac. 633; Malott v. Hood, 201 Ill. 202, 66 N. E. 247; Schneider v. Hosier, 21 Ohio St. 113.

[32] Hinshaw v. S. 147 Ind. 335, 47 N. E. 157; Western U. Tel. Co. v. James (Tex. Cv. App.), 73 S. W. 79 (ordinary care).

struction.[33] But in some states it has been held that for a failure of the trial court to give instructions, where none were requested, error may be urged if the defendant in a criminal case has been deprived of a fair trial.[34]

§ 7. Specific instructions must be requested.—Specific or more particular instructions must be requested by the party desiring them, although a statute requires the court to instruct the jury on all material issues.[35] Where the instructions correctly state the law applicable to the case as far as they go, then a party will not be heard to complain because the charge may be incomplete or not sufficiently specific.[36]

If a party desires that the charge should be more specific and sufficiently full to cover any phase of the case which may have been omitted, he should request further instructions, and failing to do so, cannot complain of error in that respect.[37] Or if an

[33] S. v. Seossoni, 48 La. Ann. 1464, 21 So. 33.

[34] Wilson v. S. 37 Tex. Cr. App. 373, 39 S. W. 373; S. v. Hathaway, 100 Iowa, 225, 69 N. W. 449; Strickland, v. S. 98 Ga. 84, 25 S. E. 908; Sledge v. S. 99 Ga. 684, 26 S. E. 756, 59 Am. St. 251.

[35] P. v. Matthai, 135 Cal. 442, 67 Pac. 694; Caveny v. Neeley, 43 S. Car. 70, 20 S. E. 806; Quirk v. St. L. N. E. Co. 126 Mo. 279, 28 S. W. 1080; Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961, 91 Am. St. 120; Texas &c. R. Co. v. Watson, 112 Fed. 402; Hammel v. Lewis, 23 Ky. L. R. 2298, 66 S. W. 1041 (as to damages); Abilene Cotton Oil Co. v. Briscoe, 27 Tex. Cv. App. 157, 66 S. W. 315, 11 Am. St. 182; Southern R. Co. v. Longbridge, 114 Ga. 173, 39 S. E. 882; International & G. N. R. Co. v. Harris (Tex. Cv. App.), 65 S. W. 885; Peterson v. S. (Tex. Cr. App.), 88 S. W. 549; Central of Ga. R. Co. v. Hardin, 114 Ga. 548, 40 S. E. 738, 58 L. R. A. 181; Rolling-Mill Co. v. Corrigan, 46 Ohio St. 294, 20 N. E. 466, 15 Am. St. 596, 3 L. R. A. 385; Denver Tr. Co. v. Crumbaugh, 23 Colo. 363, 48 Pac. 503; S. v. Varner, 115 N. Car. 744, 20 S. E. 518; Long v. Southern Pac. R. Co. 50 S. Car. 49, 27 S. E. 531; Thomas v. S. 95 Ga. 484, 22 S. E. 315.

[36] Cincinnati, &c. R. Co. v. Smock, 133 Ind. 411, 33 N. E. 108, 18 L. R. A. 774; McAfee v. Montgomery, 21 Ind. App. 196, 51 N. E. 957; Chicago B. & Q. R. Co. v. Oyster, 58 Neb. 1 78 N. W. 359; Ware Cattle Co. v. Anderson, 107 Iowa, 231, 77 N. W. 1026; National Bank v. Illinois & W. Lumber Co. 101 Wis. 247, 77 N. W. 185; Schryver v. Hawks, 22 Ohio St. 316; Galveston H. & S. A. R. Co. v. Edmunds (Tex. Cv. App.), 26 S. W. 633; First Nat. Bank v. Ragsdale, 171 Mo. 168, 71 S. W. 178; Du Souchet v. Dutcher, 113 Ind. 249, 15 N. E. 459; Conard v. Kinzie, 105 Ind. 281, 4 N. E. 863; Louisville N. A. & C. R. Co. v. Grantham, 104 Ind. 358, 4 N. E. 49; Columbus R. Co. v. Ritter, 67 Ohio St. 53, 65 N. E. 613; First Nat. Bank v. Ragsdale, 171 Mo. 168, 71 S. W. 178; Harper v. S. 101 Ind. 113; Indianapolis & G. R. Tr. Co. v. Haines (Ind.) 69 N. E. 188; Phinney v. Bronson, 43 Kas. 451; Hoyt v. Dengler, 54 Kas. 309.

[37] Hamilton v. Pittsburg B. & T. E. Co. 194 Pa. St. 1, 45 Atl. 67; Pope v. Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835; Nixon v. Jacobs, 22 Tex. Cv. App. 97, 53 S. W. 595; Gulf C. & S. F. R. Co. v. Mangham, 29 Tex. Cv. App.

instruction states a general principle of law correctly it cannot be objected to as erroneous in the absence of a request for a more specific instruction limiting its application;[37*] or the fact that a charge may be too general cannot be assigned for error unless the complaining party made request for more specific instructions.[38]

Where the instructions given cover all points involved in the case, there is no ground for error if no request be made for more

486, 69 S. W. 80; Lewin v. Pauli, 19 Pa. Super. 447; Moore v. Graham, 29 Tex. Cv. App. 235, 69 S. W. 200; Kirby v. Southern R. Co. 63 S. Car. 494, 41 S. E. 765; Lampley v. Atlantic, C. L. R. Co. 63 S. Car. 462, 41 S. E. 517; Keller v. Lewis, 116 Iowa, 369, 87 N. W. 1102; In re Hull's Will, 117 Iowa, 738, 89 N. W. 979; S. v. Young, 104 Iowa, 730, 74 N. W. 693; Owen v. Long, 97 Wis. 78, 72 N. W. 364; Baltimore & O. S-W. R. Co. v. Conoyer, 149 Ind. 524, 48 N. E. 352; Summitt Coal Co. v. Shaw, 16 Ind. App. 9, 44 N. E. 676; Sutherland v. S. 148 Ind. 695, 48 N. E. 246; Carter White-Lead Co. v. Kinlin, 47 Neb. 409, 66 N. W. 536; Housh v. S. 43 Neb. 163, 61 N. W. 571; Fortson v. Mikell, 97 Ga. 336, 22 S. E. 913; P. v. Appleton, 120 Cal. 250, 52 Pac. 582; Cleveland C. C. & St. L. R. Co. v. Richardson, 19 Ohio Cir. 385; Willard v. Williams (Colo.), 50 Pac. 207; Wood v. Long I. R. Co. 159 N. Y. 546, 54 N. E. 1095; Turner v. Tootle, 9 Kas. App. 765, 58 Pac. 562; Harris v. Flowers, 21 Tex. Cv. App. 669, 52 S. W. 1046; Felton v. Clarkson, 103 Tenn. 457, 53 S. W. 733; Burgett v. Burgett, 43 Ind. 78; Doll v. S. 45 Ohio St. 452, 15 N. E. 293, 4 Am. St. 542; Jones v. S. 20 Ohio St. 34; Smith v. Pittsburg, Ft. W. & C. R. Co. 23 Ohio St. 10; S. v. Pfefferle, 36 Kas. 90, 12 Pac. 406; P. v. Byrnes, 30 Cal. 206, 89 Am. Dec. 85; St. Louis S. W. R. Co. v. Byas, 12 Tex. Cv. App. 657, 35 S. W. 22; Reynolds v. Weiman, (Tex. Cv. App.), 40 S. W. 560; Leary v. Electric Tr. Co. 180 Pa. St. 136, 36 Atl. 562; Muncy v. Mattfield (Tex. Cv. App.), 40 S. W. 345; Moore v. Brown, 27 Tex. Cv. App. 208, 64 S. W. 946; Greenwood v. Houston I. & B. Co. 27 Tex. Cv. App. 590, 66 S. W. 585; Galveston H. & S. A. R. Co. v. Buch (Tex. Cv. App.), 65 S. W. 681; Howland v. Day, 56 Vt. 324, 48 Am. R. 791; McGee v. Smitherman, 69 Ark. 632, 65 S. W. 461; Lake S. & M. S. R. Co. v. Whidden, 23 Ohio Cir. 85; Missouri K. & T. R. Co. v. Dilworth (Tex. Cv. App.), 65 S. W. 502; Wickham v. Wolcott (Neb.), 95 N. W. 366; Crosette v. Jordan (Mich.), 92 N. W. 782; Palmer v. Smith (Conn.), 56 Atl. 516; Thorn v. Cosand, 160 Ind. 566; Little Dorritt Gold Mining Co. v. Arapahoe Gold Mining Co. 30 Colo. 431, 71 Pac. 389; Seaboard Air Line R. v. Phillips, 117 Ga. 98; Lahr v. Kraemer (Minn.), 97 N. W. 418.

[37*] Brasington v. South Bend R. Co. 62 S. Car. 325, 40 S. E. 665, 89 Am. St. 905; Parkins v. Missouri Pac. R. C. (Neb.) 93 N. W. 197; S. v. Phipps, 95 Iowa, 487, 64 N. W. 410; Parman v. Kansas City (Mo.) 78 S. W. 1046. See also Hoyt v. Dengler, 54 Kas. 309, 38 Pac. 260; Missouri Pac. R. Co. v. Peay, 7 Tex. Cv. App. 400, 26 S. W. 768; Receivers of M. K. & T. R. Co. v. Pfluger (Tex. Cv. App.), 25 S. W. 792; Gibson v. S. 114 Ga. 34, 39 S. E. 948; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. 30 Colo. 431, 71 Pac. 389; S. v. Jelinek, 95 Iowa, 420, 64 N. W. 250.

[38] Pennsylvania Co. v. Rossman, 13 Ohio C. C. 111, 7 Ohio Dec. 119; Woods v. Long Island R. Co. 42 N. Y. S. 140, 11 App. Div. 16; Texas &c. R. Co. v. Magill, 15 Tex. Cv. App. 353, 40 S. W. 188.

specific instructions.[39] And although a special charge may doubtless be proper on account of the other instructions being too general, a party is not in a position to complain, if he fails to request the court to give such special charge.[40] And where an instruction correctly states a proposition of law applicable to the evidence, a party will not be heard to complain of error on appeal, to some particular feature of it, in the absence of a request for further instructions eliminating the objectionable feature.[41]

§ 8. **Neither party requesting, effect.**—So by the same principle, if neither party asks instructions on any question involved in a case there will be no ground on which to base error for a failure to instruct the jury as to such question.[42] And where one party makes the proper request for written instructions, and afterwards withdraws it, the opposing party cannot be heard to complain, even where it was too late for him to make such request after the withdrawal by the first party.[43] And, generally speaking, under the rule requiring that instructions shall be presented to the court, a party will not be heard to complain of a failure of the court to instruct the jury on any fact, feature or element of a case on either side in the absence of a proper request for such instructions.[44]

[39] S. v. Sullivan, 43 S. Car. 205, 21 S. E. 4; S. v. Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. 864; Harness v. Steele, 159 Ind. 268, 64 N. E. 875; Kirsher v. Kirsher, 120 Iowa, 337, 94 N. W. 846; S. v. Hood, 120 Iowa, 238, 94 N. W. 564, 98 Am. St. 352; Salem Iron Co. v. Commonwealth Iron Co. 119 Fed. 593; Tuttle v. Wood, 115 Iowa, 507, 88 N. W. 1056; St. Louis S. W. R. Co. v. Hughes (Tex. Cv. App.), 73 S. W. 976; Williamson v. Gore, (Tex. Cv. App.), 73 S. W. 563; Gwaltney v. Scottish C. F. & L. Co. 115 N. Car. 579, 20 S. E. 465; P. v. Willett, 105 Mich. 110, 62 N. W. 1115; Leeper v. S. 12 Ind. App. 637, 40 N. E. 1113; Jones v. Matheis, 17 Pa. Super. 220; Musfelt v. S. 64 Neb. 445, 90 N. W. 237; Kendrick v. Dillinger, 117 N. Car. 491, 23 S. E. 438; Reichsletter v. Bostick (Tex. Cv. App.), 33 S. W. 158.

[40] Arnold v. S. (Tex. Cr. App.), 40 S. W. 591; Priel v. S. (Neb.), 91 N. W. 536.

[41] Youngstown Bridge Co. v. Barnes 98 Tenn. 401, 39 S. W. 714.

[42] Illinois Cent. R. Co. v. Haskins, 115 Ill. 307, 2 N. E. 654.

[43] Mutual, &c. Ins. Co. v. Miller, 39 Ind. 475.

[44] Brinser v. Longenecker, 169 Pa. St. 51, 32 Atl. 60; Gulf C. S. & F. R. Co. v. Perry (Tex. Cv. App.), 30 S. W. 709; Warden v. City of Philadelphia, 167 Pa. St. 523, 31 Atl. 928, 46 Am. St. 689; Wright v. Cincinnati St. R. Co. 9 Ohio C. C. 503; Dimmick v. Babcock, 92 Iowa, 692, 61 N. W. 394; International & G. N. R. Co. v. Beasley, 9 Tex. Cv. App. 569, 29 S. W. 1121; Dollman v. Haefner, 12 Ohio C. C. 721; O'Driscoll v. Lynn & B. St. R. Co. 180 Mass. 187, 62 N. E. 3 (correcting counsel in argument); Texas, &c. R. Co. v. Cody, 67 Fed. 71 (measure of damages); Texarkana & Ft. S.

§ 9. **Must request in criminal cases.**—The same rule applies in charging the jury in criminal cases. Thus, the fact that the court failed to instruct as to the presumption of innocence cannot be urged as error in the absence of a request for such instruction.[45] Or that the court did not fully and clearly define or describe the doctrine of reasonable doubt in charging the jury cannot be urged as error in the absence of a request for instructions in that respect.[46] So if the defendant fails to make a request for other or more specific instructions on any point he will not be heard to complain of the instructions given.[47]

§ 10. **Presumed in writing—When.**—Where it does not appear from the record in a court of appeal or review whether the trial court instructed the jury orally or in writing, it will be presumed the instructions were given in writing as required by statute.[48] But in Indiana the record must show that written instructions were requested, or the objection that they were not given in writing will not be considered.[49]

R. Co. v. Spencer, 28 Tex. Cv. App. 251, 67 S. W. 196 (defining market value); Woodmen, &c. v. Locklin, 28 Tex. Cv. App. 486, 67 S. W. 331; Southern R. Co. v. Coursey, 115 Ga. 602, 41 S. E. 1013; Oberdorfer v. Newberger, 23 Ky. L. R. 2323, 67 S. W. 267; J. I. Case Threshing Machine Co. v. Hoffman, 86 Minn. 30, 90 N. W. 5 (sufficiency of evidence); American Cotton Co. v. Smith, 29 Tex. Cv. App. 425, 69 S. W. 443 (contributory negligence); Miles v. Stanke, 114 Wis. 94, 89 N. W. 833 (proximate cause); Brown v. Foster, 41 S. Car. 118, 19 S. E. 299; San Antonio & A. P. R. Co. v. Kniffin, 4 Tex. Cv. App. 484, 23 S. W. 457; Galveston H. & S. A. R. Co. v. Waldo (Tex. Cv. App.), 26 S. W. 1004 (definition of negligence); Gulf C. & S. F. R. Co. v. Pendery (Tex. Civ. App.), 27 S. W. 213 (contributory negligence); Buzzell v. Emerton, 161 Mass. 176, 36 N. E. 796; Sigal v. Miller (Tex. Cv. App.), 25 S. W. 1012; Templeton v. Green (Tex. Cv. App.), 25 S. W. 1073; Doll v. S. 45 Ohio St. 452, 15 N. E. 293, 4 Am. St. 542; State v. Bennett, 8 Ind. App. 679, 36 N. E. 551, construction of document; Fink v. Gulf C. & S. F. R. Co. 4 Tex. Cv. App. 269, 23 S. W. 330; Hargadine v. Davis (Tex. Cv. App.) 26 S. W. 424; Willis v. Lockett (Tex. Cv. App.), 26 S. W. 419; Kerr v. S. 63 Neb. 115, 88 N. W. 240; Clemmons v. S. 43 Fla. 200, 30 So. 699; Martin v. S. (Neb.), 93 N. W. 161; Jones v. S. 20 Ohio, 34.

[45] Williams v. P. 164 Ill. 481, 45 N. E. 987; P. v. Hinshaw (Mich.), 97 N. W. 758.

[46] Miller v. S. (Wis.), 81 N. W. 1020; Burgess v. S. (Tex. Cr. App.), 42 S. W. 562; Meehan v. S. (Wis.), 97 N. W. 174; Herman v. S. 75 Miss, 340, 22 So. 873; Shiver v. S. 41 Fla. 630, 27 So. 36; P. v. Brittain, 118 Cal. 409, 50 Pac. 664; Bynum v. S. (Fla.), 35 So. 65.

[47] Douthill v. Ter. 7 Okla. 55, 54 Pac. 312; S. v. Smith, 106 Iowa, 701, 77 N. W. 499; Cupps v. S. (Wis.), 97 N. W. 218; Cramer v. S. 21 Ind. App. 502, 52 N. E. 239; Com. v. Washington, 202 Pa. St. 148, 51 Atl. 757 (instruction reviewing the testimony).

[48] Condon v. Brockway, 157 Ill. 91, 41 N. E. 634; Citizens, &c. Ins. Co. v. Short, 62 Ind. 316.

[49] Nickless v. Pearson, 126 Ind. 477, 26 N. E. 478.

§ 11. Written and oral charge.—In some jurisdictions the court may read to the jury from the statutes of the state without violating the statute requiring that the instructions shall be in writing.[50] According to the practice in North Carolina, while the entire charge to the jury must be given in writing, yet the court may give an oral summary of the evidence.[51]

§ 12. Waiving written instructions.—The right to have the jury instructed in writing as provided by statute may be waived by the parties agreeing that the court may instruct orally.[52] Or if a party sits by and without objection allows the court to instruct the jury orally, the same being taken down by a stenographer, he thereby waives written instructions.[53] And where a party neglects to prepare and ask instructions on a particular phase or feature of a case he waives any rights he may have had in that respect.[54]

Thus, where the instructions given do not state the law accurately and with certainty, a party waives his right to object on that account if he fails to ask additional instructions to cover the deficiency.[55] So where a party fails to request written instructions, he cannot complain that his opponent's in-

[50] P. v. Brown, 59 Cal. 345; S. v. Mortimer, 20 Kas. 93; Palmore v. S. 29 Ark. 248; S. v. Thomas, 34 La. Ann. 1084; Contra: Smur v. S. 88 Ind. 509. See Sellers v. City of Greencastle, 134 Ind. 645, 34 N. E. 534; Manier v. S. 6 Baxt. (Tenn.) 595; S. v. Birmingham, 74 Iowa, 407, 38 N. W. 121.

[51] Phillips v. Wilmington, 130 N. Car. 582, 41 S. E. 805. See Aiken v. Com. 24 Ky. L. R. 523, 68 S. W. 849; see Green v. Com. 17 Ky. L. R. 943, 33 S. W. 100.

[52] Bates v. Ball, 72 Ill. 108, 112; Cutter v. P. 184 Ill. 395, 56 N. E. 412; Vick v. S. (Tex. Cr. App.), 69 S. W. 156; Bruen v. P. 206 Ill. 425; see Voght v. S. 145 Ind. 12, 43 N. E. 1049; Keith v. Wells, 14 Colo. 321, 23 Pac. 991; Kuhn v. Nelson, 61 Neb. 224, 85 N. W. 56; Clark v. S. 31 Tex. 574; S. v. Chevallier, 36 La. Ann. 85; Continental Nat. Bank v. Folson, 67 Ga. 624, 44 Am. R. 739.

[53] Frye v. Ferguson, 6 S. Dak. 392, 61 N. W. 161; Heaston v. Cincinnati & Ft. W. R. Co. 16 Ind. 275, 79 Am. Dec. 430. See Johnson v. Gulledge, 115 Ga. 981, 42 S. E. 354.

[54] City of Chicago v. Keefe, 114 Ill. 230, 2 N. E. 267, 55 Am. R. 860; Young v. Town of Macomb, 42 N. Y. S. 351, 11 App. Div. 480; Frye v. Ferguson, 6 S. Dak. 392, 61 N. W. 161; Caveny v. Neely, 43 S. Car. 70, 20 S. E. 806; Browning v. Wabash W. R. Co. 124 Mo. 55, 27 S. W. 644; Quirk v. St. L. N. E. Co. 126 Mo. 279, 28 S. W. 1080; Union Pac. R. Co. v. Stanwood (Neb.), 91 N. W. 191; Hindman v. Timme, 8 Ind. App. 416, 35 N. E. 1046; S. v. Beatty, 51 W. Va. 232 (imprisonment recommended by the jury instead of death penalty).

[55] Cincinnati & H. T. Co. v. Hester, 12 Ohio C. C. 350; Pierce v. Arnold Print Works, 182 Mass. 260, 65 N. E. 368 (instruction obscure); Schmitt v. Murray, 87 Minn. 250, 91 N. W. 1116.

structions were not given in writing.[56] And where under the rules of practice a party is permitted to have instructions given to the jury before arguments of counsel, and he fails to insist on that right, the fact that the court gives the instructions after arguments in the final charge is not error of which complaint can be made, although the instructions were submitted to the court before arguments.[57]

§ 13. Exceptions to oral charges.—The giving of an oral charge where a statute requires written instructions, affords no ground to complain of error if no exceptions be taken to such charge, especially where a party sits by and allows the court to thus instruct without making objection or taking exception.[58] The fact that the court may hand the instructions to the jury without reading them is not ground for error in the absence of an exception to such course.[59]

§ 14. Time of requesting—Rule of court.—Instructions should be requested within the time stated by the rules of the court, and if not so requested the court may in its discretion refuse them,[60] and such refusal affords no ground for error.[61] In the absence of a rule of the court, instructions may be presented at the conclusion of the introduction of the evidence.[62]

[56] Jacqua v. Cordesman & E. Co. 106 Ind. 141, 5 N. E. 907; Mutual B. S. I. Co. v. Miller, 39 Ind. 475.

[57] City of Toledo v. Higgins, 12 Ohio C. C. 646.

[58] Hefling v. Vanzandt, 162 Ill. 166, 44 N. E. 424; Swaggart v. Ter. 6 Okla. 344, 50 Pac. 96; Frye v. Ferguson, 6 S. Dak. 392, 61 N. W. 161; Phillips v. Wilmington & W. R. Co. 130 N. Car. 582, 41 S. E. 805; Heaston v. Cincinnati & Ft. W. R. Co. 16 Ind. 275, 79 Am. Dec. 430. See Deets v. National Bank, 57 Kas. 288, 46 Pac. 306. When not waived: S. v. Bungardner, 7 Baxt. (Tenn.) 163; S. v. Cooper, 45 Mo. 66; S. v. Hopkins, 33 La. Ann. 34.

[59] Little M. R. Co. v. Washburn, 22 Ohio St. 333. See S. v. Missio, 105 Tenn. 218; Veneman v. McCurtain, 33 Neb. 643, 50 N. W. 955. See also Stringham v. Cook, 75 Wis. 590, 44 N. W. 777; Prater v. Snead, 12 Kas. 447; Louisville & N. R. Co. v. Hall, 91 Ala. 113, 8 So. 371, 24 Am. St. 863, 12 L. R. A. 134; Venway v. S. 41 Tex. 639; Sutherland v. Venard, 34 Ind. 390; S. v. DeMosse, 98 Mo. 340, 11 S. W. 731, 14 Am. St. 645, 4 L. R. A. 776.

[60] Arnold v. Lane, 71 Conn. 61, 40 Atl. 921; Chicago C. R. v. Sullivan, 76 Ill. App. 505. See Hoye v. Turner, 96 Va. 624, 32 S. E. 291; Phillips v. Thorne, 103 Ind. 275, 2 N. E. 747; Waldie v. Doll, 29 Cal. 555; Town of Noblesville v. Vestal, 118 Ind. 80, 20 N. E. 479.

[61] Shober v. Wheeler, 113 N. Car. 370, 18 S. E. 328; Marsh v. Richardson, 106 N. Car. 539, 11 S. E. 522; Ter. v. Harper, 1 Ariz. 399; Cady v. Owen, 34 Vt. 598; Benson v. S. 119 Ind. 488, 21 N. E. 1109; Street R. Co. v. Stone, 54 Kas. 83.

In some of the states the time when instructions must be presented to the court is fixed by statute.

[62] St. Louis & S. F. R. Co. v. Dawson, 7 Kas. App. 466, 53 Pac.

Under a rule of court requiring instructions to be presented to the court before the close of the arguments to the jury, they are in time if presented to the court before the close of the argument for the plaintiff, and it is error to refuse them on the ground that they were not presented in time.[63] And under a statute requiring that instructions shall be given before arguments, it is error to give them after arguments.[64]

But according to the practice in Missouri the court may give instructions after arguments of counsel, although the statute provides that the court may instruct the jury "when the evidence is concluded and before the case is argued."[65] But instructions may be asked at the conclusion of the charge on any matter which has been omitted or in which the charge is improper.[66] Also the giving of instructions after arguments for the purpose of advising the jury as to mistakes or misconduct in argument is perfectly proper.[67]

In North Dakota instructions are requested in time if presented before the jury retire to consider of their verdict.[68] In some jurisdictions instructions should be presented to the court before the general charge, to be of any avail in the assignment of error on appeal.[69] If special instructions should be submitted before the court has given the general charge, the refusal to give them will not be ground for error,[70] but in other jurisdic-

892; S. v. Haerston, 121 N. Car. 579, 28 S. E. 492; Illinois Cent. R. Co. v. Haskins, 115 Ill. 300, 311, 2 N. E. 654; Manning v. Gasharie, 27 Ind. 399.

[63] Bowman v. Witlig, 39 Ill. 416, 429. See Root v. Boston E. R. Co. 183 Mass. 418.

[64] Root v. Village of M. 16 Ohio C. C. 457; Village of Monroeville v. Root, 54 Ohio St. 523, 44 N. E. 237, 56 Am. St. 731; Atchison, T. & S. F. R. Co. v. Franklin, 23 Kas. 74; P. v. Silva, 121 Cal. 668, 54 Pac. 146, unless in case of exception to the rule.

[65] Boggess v. Metropolitan St. R. Co. 118 Mo. 328, 24 S. W. 210.

[66] Brick v. Rosworth, 162 Mass. 334, 39 N. E. 36, 44 Am. St. 362, 26 L. R. A. 256; Brooks v. S. 96 Ga. 353, 23 S. E. 413; Chapman v. McCormick, 86 N. Y. 479; McMahon v. O'Connor, 137 Mass. 216; P. v. Garbutt, 17 Mich. 25, 97 Am. Dec. 162.

[67] Yore v. Mueller Coal H. H. & T. Co. 147 Mo. 679, 49 S. W. 855; P. v. Sears, 18 Cal. 635; Crippen v. Hope, 38 Mich. 344; Kellog v. Lewis, 28 Kas. 535; Foster v. Turner, 31 Kas. 58, 1 Pac. 145.

[68] S. v. Barry (N. Dak.), 94 N. W. 809.

[69] City of Chicago v. Le Moyne, 119 Fed. 662; Gallagher v. McMullen, 40 N. Y. S. 222 (additional instructions requested after the charge held not unseasonably made); Fitch v. Belding, 49 Conn. 463; Marsh v. Richardson, 106 N. Car. 539, 11 S. E. 522; Billings v. McCoy, 5 Neb. 187.

[70] Myers v. Taylor, 107 Tenn. 364, 64 S. W. 719.

tions requests for additional instructions may be made after the general charge.[71]

§ 15. **Time of requesting—Too late.**—Instructions are not presented in time after the arguments have commenced, where they are required to be presented at the close of the evidence,[72] or presenting written instructions after the court has commenced the oral charge is too late.[73]

§ 16. **Error to refuse instruction—When.**—Where, under the practice, counsel has the right to assume that the court will, without request, state such rules of law as are pertinent and applicable to the evidence, the refusal of an instruction embodying a correct rule not embraced in the charge is error, and should not be refused on the ground that it was not requested before the charge was given to the jury.[74]

§ 17. **Court may give time.**—Where the statute requires the instructions to be requested and presented before the argument, the court in its discretion may defer the argument until counsel have time to prepare and present instructions; but it is not error for a court to refuse to grant such time unless it appears that the court has abused its discretion;[75] but the court in its discretion may give instructions though not requested in time.[76]

§ 18. **Court's authority to make rules.**—The court, undoubtedly, has power to make a rule as to when in the progress of

[71] Boone v. Miller, 73 Tex. 557, 11 S. W. 551; Williams v. Miller, 2 Lea (Tenn.) 406; Brooks v. S. 96 Ga. 353, 23 S. E. 413.

[72] Evansville & T. H. R. Co. v. Crist, 116 Ind. 457, 19 N. E. 310, 9 Am. St. 865, 2 L. R. A. 450; Bartley v. S. 111 Ind. 358, 12 N. E. 503. See German F. Ins. Co. v. Columbia E. T. Co. 15 Ind. App. 623, 43 N. E. 41; Lake E. & W. R. Co. v. Brafford, 15 Ind. App. 655, 43 N. E. 382; Ransbottom v. S. 144 Ind. 250, 43 N. E. 218; Gould v. Gilligan, 181 Mass. 600, 64 N. E. 409.

[73] Boggs v. Clifton, 17 Ind. 217; Newton v. Newton, 12 Ind. 527. See Flint v. Nelson, 10 Utah, 261, 37 Pac. 479; S. v. Forbes (La.), 35 So. 710.

[74] Malone v. Third Ave. R. Co. 42 N. Y. S. 694, 12 App. Div. 508.

[75] Phillips v. Thorne, 103 Ind. 275, 2 N. E. 747; Williams v. Com. 85 Va. 607, 8 S. E. 470; O'Neil v. Dry Dock, &c. Co. 129 N. Y. 130, 29 N. E. 84, 26 Am. St. 512.

[76] Buck v. People's St. R. & E. L. & P. Co. 108 Mo. 129, 18 S. W. 1090; Tully v. Despard, 31 W. Va. 370, 6 S. E. 927; Phillip's Case, 132 Mass. 233; Engeman v. S. 54 N. J. L. 247, 23 Atl. 676; Wood v. S. 64 Miss. 761, 2 So. 247. See P. v. Keefer, 18 Cal. 636.

a trial instructions shall be presented to the court, and such rule will be enforced if it is not in conflict with the law. But to make such rule valid and obligatory upon suitors it must be in writing and spread upon the records of the court and given reasonable publicity.[77] But such a rule must be fair and reasonable,[78] and not repugnant to the law.[79]

§ 19. Too many instructions.—The giving of many instructions upon every conceivable phase of the law is a pernicious practice, and tends to confuse rather than to enlighten the jury upon the issues.[80] The issues in a case being very simple, there should be only a few brief instructions. The giving of many on either side in such case naturally leads to confusion.[81] When instructions are numerous or prolix they are more apt to mislead the jury, unless prepared with great care, than when they are few in number and simple in structure.[82]

Where the instructions requested are too numerous or voluminous, the court may refuse them and charge the jury on its own motion.[83] But the court cannot arbitrarily limit the number of instructions each side shall be entitled to request.[84] The fact that more instructions have been requested than necessary

[77] Illinois Cent. R. Co. v. Haskins, 115 Ill. 311, 2 N. E. 654.

[78] Prindeville v. P. 42 Ill. 217, 221; Sterling Organ Co. v. House, 25 W. Va. 65.

[79] Laselle v. Wells, 17 Ind. 33, 79 Am. Dec. 453; Conner v. Wilkie, 1 Kas. App. 492.

[80] Gilmore v. P. 124 Ill. 380, 15 N. E. 758; Chicago & E. R. Co. v. Holland, 122 Ill. 469, 13 N. E. 145; Dunn v. P. 109 Ill. 635, 646; Adams v. Smith, 58 Ill. 419; Murphy v. Chicago, R. I. & P. R. Co. 38 Iowa, 539; S. v. Ward, 19 Nev. 297, 10 Pac. 133; Brant v. Gallup, 111 Ill. 487, 53 Am. R. 638; S. v. Floyd, 15 Mo. 355; Haney v. Caldwell, 43 Ark. 184; Ingram v. S. 62 Miss. 142; Chicago & A. R. Co. v. Kelly, 25 Ill. Ap. 19; Mutual B. L. I. Co. v. French, 2 Cin. (Ohio), 321; S. v. Ott, 49 Mo. 326.

The state's attorney should ask very few instructions in criminal cases, and those as plain and simple as language can make them. Miller v. P. 39 Ill. 466; Gilmore v. P. 124 Ill. 383, 15 N. E. 758; Barr v. P. 113 Ill. 471.

[81] Chicago P. & M. R. Co. v. Mitchell, 159 Ill. 406, 42 N. E. 973; Jacobson v. Gunzburg, 150 Ill. 135, 37 N. E. 229; Omaha St. R. Co. v. Boeson (Neb.), 94 N. W. 619; S. v. Mix, 15 Mo. 159; Talbort v. Mearns, 21 Mo. 427; Hanger v. Evins, 38 Ark. 338.

[82] Springdale Cemetery Asso. v. Smith, 24 Ill. 480, 483; P. v. Ah Fung, 17 Cal. 377.

[83] Moriarty v. S. 62 Miss. 661; Crawshaw v. Summer, 56 Mo. 517; Hanger v. Evins, 38 Ark. 338. See Chicago C. R. Co. v. Sandusky, 99 Ill. App. 164; Roe v. Taylor, 45 Ill. 485; McCaleb v. Smith, 22 Iowa, 244; Mabry v. S. 71 Miss. 716, 14 So. 267.

[84] Chicago City R. Co. v. O'Donnell, 208 Ill. 280; Cobb Chocolate Co. v. Kundson, 207 Ill. 461.

will not justify the court in the refusal of necessary and proper instructions which have been requested.[85] The giving of voluminous instructions which tend to confuse and mislead may be ground for a new trial.[86]

§ 20. Repeating generally not required.—Where all the instructions as given fully and clearly cover every phase or branch of the case, that is sufficient without repetition. The court is not bound to repeat in other instructions any of the principles embraced in those given at the request of either party or by the court on its own motion.[87]

[85] North C. St. R. Co. v. Polkey, 203 Ill. 231.

[86] Thatcher v. Quirk, 4 Idaho, 267, 38 Pac. 652; Sidway v. Missouri L. & L. S. Co. 163 Mo. 342.

[87] Montag v. P. 141 Ill. 75, 81, 30 N. E. 337; Chicago C. R. Co. v. Van Vleck, 143 Ill. 480, 484, 32 N. E. 262; City of Salem v. Webster, 192 Ill. 369, 61 N. E. 323; City of Sterling v. Merrill, 124 Ill. 522, 17 N. E. 6; S. v. Grant, 152 Mo. 57, 53 S. W. 432; S. v. Kearley, 26 Kas. 77; Chicago, &c. R. Co. v. Groves, 56 Kas. 601; Spahn v. P. 137 Ill. 545, 27 N. E. 688; Lyons v. P. 137 Ill. 619, 27 N. E. 677; Thompson v. Duff, 119 Ill. 226, 10 N. E. 399; Freidberg v. P. 102 Ill. 164; Great N. R. Co. v. McLaughlin, 70 Fed. 669; Bowen v. Sweeney, 35 N. Y. S. 400; Bon v. S. 23 Ohio St. 349, 13 Am. R. 253; Wrisley v. Burke, 203 Ill. 259; S. v. Linhoff (Iowa) 97 N. W. 77; Heltonville Mfg. Co. v. Fields, 138 Ind. 58, 36 N. E. 529, 46 Am. St. 368; Siberry v. S. 149 Ind. 684, 39 N. E. 936; Deitz v. Regnier, 27 Kas. 94; S. v. Bailey, 32 Kas. 83, 3 Pac. 769; Missouri Pac. R. Co. v. Johnson, 44 Kas. 660, 24 Pac. 1116; Muncie Natural Gas Co. v. Allison (Ind.), 67 N. E. 111; Foster v. Pacific C. S. 30 Wash. 515, 71 Pac. 48; S. v. Parker, 172 Mo. 191, 72 S. W. 650; Texas, &c. R. Co. v. Smissen (Tex. Cv. App.), 73 S. W. 42; S. v. Dent, 170 Mo. 1, 70 S. W. 881; Bond v. S. 23 Ohio St. 349, 13 Am. R. 253; Schafstelle v. St. Louis & M. R. Co. 175 Mo. 142, 74 S. W. 826; S. v. Pancoast (N. Dak.), 67 N. W. 1052; S. v. Smith, 142 Ind. 288, 41 N. E. 595; Painter v. P. 147 Ill. 444, 469, 35 N. E. 64; Field v. Crawford, 146 Ill. 136, 34 N. E. 481; Cleveland, C. & St. L. R. Co. v. Walter, 147 Ill. 60, 35 N. E. 529; Howard v. Supervisors, 54 Neb. 443, 74 N. W. 953; Crane Co. v. Tierney, 175 Ill. 79, 51 N. E. 715; Alton Pav. B. & Fire B. Co. v. Hudson, 176 Ill. 270, 52 N. E. 256; Lincoln v. Felt (Mich.), 92 N. W. 780; New Omaha Thompson-Houston Elec. Light Co. v. Johnson (Neb.), 93 N. W. 778, (contributory negligence); Morgan v. S. (Neb.), 93 N. W. 743; Coombs v. Mason, 97 Me. 270, 54 Atl. 728, (due care and contributory negligence); Howe v. Miller, 23 Ky. L. R. 1610, 65 S. W. 353; Boyd v. Portland Elec. Co. 40 Ore. 126, 66 Pac. 576; Central of Ga. R. Co. v. Trammell, 114 Ga. 312, 40 S. E. 259; Nebraska M. M. Ins. Co. v. Sasek, 64 Neb. 17, 89 N. W. 428; Lobdell v. Keene, 85 Minn. 90, 88 N. W. 426; Kowalski v. Chicago G. W. R. Co. (Iowa), 87 N. W. 409; Bassett v. S. (Fla.), 33 So. 262; Belding v. Archer, 131 N. Car. 287, 42 S. E. 800; Rockford Ins. Co. v. Nelson, 65 Ill. 415, 425; Davis v. Wilson, 65 Ill. 525, 531; Twining v. Martin, 65 Ill. 157, 160; Reid v. S. (Tex. Cv. App.), 57 S. W. 662; Shenenberger v. S. 154 Ind. 630, 57 N. E. 519; Ragland v. S. 125 Ala. 12, 27 So. 983; P. v. Thiede, 11 Utah, 241, 39 Pac. 837; Bryant

§ 21. **Repeating on preponderance—Reasonable doubt.**—Thus, for instance, the rule requiring the plaintiff to prove his case by a preponderance of the evidence need not be repeated when once correctly stated in an instruction given;[88] or the rule requiring the prosecution to prove the guilt of the accused beyond a reasonable doubt before a conviction can be had, need not be repeated.[89]

§ 22. **Repeating in detail—Words, phrases.**—And under this rule the refusal of an instruction which presents a subject mat-

v. S. 34 Fla. 291, 16 So. 177; Phillips v. S. (Tex. Cr. App.), 31 S. W. 644; S. v. La Grange, 94 Iowa, 60, 62 N. W. 664; Dunn v. Bushnell (Neb.), 83 N. W. 693; Myer v. Richards, 111 Fed. 296; S. v. Prater, 52 W. Va. 132, 43 S. E. 230, 241; Fletcher v. Louisville & N. R. Co. 102 Tenn. 1, 49 S. W. 739; Coghill v. Kennedy, 119 Ala. 641, 24 So. 459; Moratsky v. Wirth, 74 Minn. 146, 76 N. W. 1032; Pearce v. Strickler, 9 N. Mex. 467, 54 Pac. 748; Smith v. Southern R. Co. 53 S. Car. 121, 30 S. E. 697; Clark v. Bennett, 123 Cal. 275, 55 Pac. 908; Bates-Smith Ins. Co. v. Scott, 56 Neb. 475, 76 N. W. 1063; Lyne v. Western U. Tel. Co. 123 N. Car. 129, 31 S. E. 350; Missouri K. & T. R. Co. v. Hennessy (Tex.) 49 S. W. 641; Bacon v. Bacon, 76 Miss. 458, 24 So. 968; Prosser v. Pretzel, 8 Kas. App. 856, 55 Pac. 854; Indiana I. & I. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175, 71 Am. St. 345; National Bank of Merrill v. Illinois & W. Lumber Co. 101 Wis. 247, 77 N. W. 185; Leifheit v. Jos. Schlitz Brewing Co. 106 Iowa, 451, 76 N. W. 730; Keyes v. City of Cedar Rapids, 107 Iowa, 509, 78 N. W. 227.

The court in charging the jury may refer to other parts of the charge without repeating: O'Leary v. German A. Ins. Co. 100 Iowa, 390, 69 N. W. 686; Jensen v. Seiber, (Neb.), 93 N. W. 697.

[88] Decatur Cereal Mill Co. v. Gogerty, 180 Ill. 197, 54 N. E. 231; Metropolitan W. S. E. R. Co. v. Skola, 183 Ill. 454, 458, 56 N. E. 171, 75 Am. St. 115; S. v. Pyscher (Mo.), 77 S. W. 841; Smith v. Smith, 169 Ill. 624, 48 N. E. 306; Taylor v. Cox, 153 Ill. 220, 229, 38 N. E. 656; Riepe v. Elting, 89 Iowa, 82, 56 N. W. 285, 48 Am. St. 356; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Village of Altamont v. Carter, 196 Ill. 286, 97 Ill. App. 196.

[89] Schintz v. P. 178 Ill. 320, 328, 52 N. E. 903; Toledo, St. L. K. C. R. Co. v. Bailey, 145 Ill. 162, 33 N. E. 1089; Mackin v. P. 115 Ill. 312, 329, 3 N. E. 222, 56 Am. R. 167; P. v. Gilmore, (Cal.) 53 Pac. 806; Jones v. S. (Tex. Cr. App.), 45 S. W. 596; Davis v. S. 51 Neb. 301, 70 N. W. 984; Miller v. S. 106 Wis. 156, 81 N. W. 1020; Kennedy v. P. 44 Ill. 283; Peri v. P. 65 Ill. 17, 25; Sanches v. S. (Tex. Cr. App.), 55 S. W. 44; Spears v. S. 41 Tex. Cr. App. 527, 56 S. W. 347; Ford v. S. (Tex. Cr. App.), 56 S. W. 338; Edens v. S. 41 Tex. Cr. App. 522, 55 S. W. 815; S. v. Currie, 8 N. Dak. 545, 80 N. W. 475. See Cook v. P. 177 Ill. 146, 155, 52 N. E. 273; Franklin v. S. 34 Tex. Cr. App. 625, 31 S. W. 643; Carleton v. S. 43 Neb. 373, 61 N. W. 699; S. v. Tippet, 94 Iowa, 646, 63 N. W. 445; Deilks v. S. 141 Ind. 23, 40 N. E. 120; S. v. Hopkins, 94 Iowa, 86, 62 N. W. 656; Ramirez v. S. (Tex. Cr. App.), 65 S. W. 1101; Wheeler v. S. 158 Ind. 687, 63 N. E. 975; McCulley v. S. 62 Ind. 428; Lewis v. S. (Tex. Cr. App.), 59 S. W. 886; Steiner v. P. 187 Ill. 244.

ter more in detail than a very general one given on the same subject, cannot ordinarily be urged as error.[90]

It is not necessary to instruct upon each separate item of evidence when the court has given full instructions covering the whole case.[91] Also any word, phrase or expression which has once been explained need not be again explained when used in other parts of the charge.[92]

§ 23. **Repeating—As to defense.**—So also the court having once charged that a certain defense must be established by a preponderance of the evidence, a refusal to instruct that the verdict must be according to the weight of the evidence is not error.[93] So when a defense has once been fully and clearly stated in one instruction the court is not required to reiterate it in each of the others.[94]

§ 24. **Repeating—As to witnesses.**—Likewise under the same rule the refusal to instruct on the credibility of the plaintiff as a witness, that if the jury believe he has testified wilfully falsely to any material fact, they may take that fact into consideration in weighing his testimony is not material error where the general charge states substantially the same principal applicable to any or all of the witnesses.[95] Nor need the court repeat an instruction as to the interest any witness may have in the result of the suit or trial, though the requested instruction be in somewhat different language.[96]

§ 25. **Repeating—Request substantially given by others.**—It follows from what has been said that although the requested instructions may correctly state the law applicable to the facts in issue, they are properly refused if the same principles or doctrines are substantially embodied in others given at the request of either party.[97] Thus in an action where negligence is a

[90] O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930.

[91] S. v. Smith, 142 Ind. 288, 41 N. E. 595.

[92] Griffin v. Mulley, 167 Pa. St. 339, 31 Atl. 664; French v. Ware, 65 Vt. 338, 26 Atl. 1096, 36 Am. St. R. 864; Scruggs v. S. 35 Tex. Cr. App. 622, 34 S. W. 951 ("adequate cause" in homicide case); Childs v. S. 35 Tex. Cr. App. 573, 34 S. W. 939.

[93] Agnew v. Farmers' M. P. Fire Ins. Co. 95 Wis. 445, 70 N. W. 554.

[94] Canthem v. S. (Tex. Cr. App.), 65 S. W. 96; Ter. v. Gonzales (N. Mex.), 68 Pac. 925.

[95] Whitaker v. Engle, 111 Mich. 205, 69 N. W. 493.

[96] Chicago City R. Co. v. Mayer, 185 Ill. 336, 56 N. E. 1058, 76 Am. St. R. 30; Dunham Towing & Wrecking Co. v. Dandelin, 143 Ill. 414, 32 N. E. 258.

[97] Indianapolis St. R. Co. v. Hockett, 159 Ind. 683; City of Joliet v.

material element of the plaintiff's case, the refusal of the general

Johnson, 177 Ill. 183, 52 N. E. 498; England v. Fawbush, 204 Ill. 400; Crane Co. v. Tierney, 175 Ill. 79, 82, 51 N. E. 715; Spence v. Huckins, 208 Ill. 369; Whitney S. Co. v. O'Rourke, 172 Ill. 177, 186, 50 N. E. 242; Franklin v. Krum, 171 Ill. 378, 49 N. E. 513; S. v. Clark, 51 W. Va. 457, 90 Am. St. 819; Davis v. Hall, (Neb.), 97 N. W. 1023; Kidman v. Garrison (Iowa), 97 N. W. 1078; Collins v. Chicago, M. & St. P. R. Co. (Iowa), 97 N. W. 1103; Jones v. Johnson (N. Car.), 45 S. E. 828; S. v. Stantz (Wash.), 74 Pac. 590; Morrison v. Northern Pac. R. Co. (Wash.), 74 Pac. 1066; Wildman v. S. (Ala.), 35 So. 995; Baldwin v. S. (Fla.), 35 So. 221; Cook v. S. (Fla.), 35 So. 669; Kilpatrick v. Grand T. R. Co. 74 Vt. 288, 52 Atl. 531, 93 Am. St. 887; Southern I. R. Co. v. Davis (Ind.) 69 N E. 554; Copeland v. Hewitt, 96 Me. 525, 53 Atl. 36; Chicago C. R. Co. v. Fennimore, 199 Ill. 18; Crossen v. Grandy, 42 Ore. 282, 70 Pac. 906; West C. St. R. Co. v. Lieserowitz, 197 Ill. 616; S. v. Ashcraft, 170 Mo. 409, 70 S. W. 898; Chicago, R. I. & P. R. Co. v. Groves, 56 Kas. 601, 44 Pac. 628; Missouri, K. & T. R. Co. v. Fuller, 72 Fed. 468; Thorp v. Carvalho, 36 N. Y. S. 1, 14 Misc. 554; Pyle & Pyle, 158 Ill. 289, 41 N. E. 999; Burgess v. Davis Sulphur Ore Co. 165 Mass. 71, 42 N. E. 501; Arthur v. City of Charleston, 51 W. Va. 132, 90 Am. St. 772; Pittsburg, C. C. & St. L. R. Co. v. Hewitt, 202 Ill. 28, 66 N. E. 829; Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E 188; Southern Ind. R. Co. v. Harrell (Ind. App.), 66 N. E. 1016; Frank Bird Tr. Co. v. Krug, 30 Ind. App. 602, 65 N. E. 309; Continental Nat. Bank v. Tradesmen's Nat. Bank 173 N. Y. 272, 65 N. E. 1108; Stuart v. Mitchum, 135 Ala. 546, 33 So. 670; West Va. C. & P. R. Co. v. S. 96 Md. 652, 54 Atl. 669, 61 L. R. A. 574; Copeland v. Hewitt, 96 Me. 525, 53 Atl. 36; Southern E. R. Co. v. Hageman, 121 Fed. 262 (substance given in different language); Stockslager v. U. S. 116 Fed. 590; Marcus v. Leake (Neb.), 94 N. W. 100; S. v. Shunka, 116 Iowa, 206, 89 N. W. 977; Waterhouse v. Jos. S. Brew. Co. (S. Dak.), 94 N. W. 587; S. v. Landano, 74 Conn. 638, 51 Atl. 860; Gill v. Donovan, 96 Md. 518, 54 Atl. 117; Hartsel v. S. (Tex. Cr. App.), 68 S. W. 285; Warner v. Chicago & N. W. R. Co., 120 Iowa, 159, 94 N. W. 490; Bell v. Incorporated Town of Clarion, 120 Iowa, 332, 94 N. W. 907; Sellman v. Wheeler (Md.), 54 Atl. 512; Reynolds v. Pierson, 29 Ind. App. 273, 64 N. E. 484; Kennard v. Grossman (Neb.), 89 N. W. 1025; Western Stone Co. v. Musical, 196 Ill. 382, 63 N. E. 664, 89 Am. St. 325; Himrod Coal Co. v. Clark, 197 Ill. 514, 64 N. E. 282; Corbus v. Leonhardt, 114 Fed. 10; Moran Bros. Co. v. Snoqualmie Falls Power Co. 29 Wash. 292, 69 Pac. 759; Lee v. Hammond, 111 Wis. 550, 90 N. W. 1073; Record v. Chickasaw Cooperage Co. 103 Tenn. 657, 69 S. W. 334; McKnight v. Detroit, M. R. Co. (Mich.), 97 N. W. 772; Fidelity & Deposit Co. v. Courtney, 186 U. S. 342, 22 Sup. Ct. 833; Kilpatrick v. Grand T. R. Co. 74 Vt. 288, 52 Atl. 531, 93 Am. St. 887; Swensen v. Bender, 114 Fed. 1; Arthur v. City of Charleston, 51 W. Va. 132, 41 S. E. 171, 90 Am. St. 772; Cupps v. S. (Wis.), 97 N. W. 217; Christensen v. Lambert, 67 N. J. L. 341, 51 Atl. 702; Cauble v. Worsham (Tex. Cv. App.), 69 S. W. 194; Wolf v. Hemrich Bros. Brew. Co. 28 Wash. 187, 68 Pac. 440; Connaughton v. Sun Printing & Pub. Co. Asso. 76 N. Y. S. 755, 73 App. Div. 316; Laflan v. Missisquoi Pulp Co. 74 Vt. 125, 52 Atl. 526; Downey v. Germini Min. Co. 24 Utah, 431, 68 Pac. 414, 91 Am. St. 798; Ray v. S. 108 Tenn. 282, 67 S. W. 553; S. v. Barnes (Utah), 69 Pac. 70; S. v. Hicks, 130 N. Car. 705, 41 S. E. 803; Danforth v. S. (Tex. Cr. App.), 69 S. W. 159; Myers v. S. 43 Fla. 500, 31 So. 275; Johnson v. S. (Tex. Cr. App.), 67 S. W. 412; S. v. Brennan (Mo.), 65 S. W. 325; Bannen v. S. 115 Wis. 317, 91 N. W. 107; Curry v. Catlin, 12 Wash. 322, 41 Pac. 55; Huston v. P. 121 Ill. 497, 500 13 N.

definition of negligence is not error where the court in another

E. 538; Crews v. P. 120 Ill. 317, 320, 11 N. E. 404; May v. Tallman, 20 Ill. 443; S. v. McDonald, 57 Kas. 537, 46 Pac. 966; S. v. Easton, 138 Mo. 103, 39 S. W. 461; Lake R. E. R. Co. v. McKewen, 80 Md. 593, 31 Atl. 797; Bewley v. Massie (Tex. Civ. App.), 31 S. W. 1086; Bushnell v. Chamberlain, 44 Neb. 751, 62 N. W. 1114; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; S. v. Harrison, 66 Vt. 523, 29 Atl. 807, 44 Am. St. 864; Ludwig v. Metropolitan St. R. Co. 75 N. Y. S. 667, 71 App. Div. 210; Carstens v. Stetson & P. M. Co. 14 Wash. 643, 45 Pac. 313; Crown Coal & Tow Co. v. Taylor, 184 Ill. 250, 56 N. E. 328; Kendall v. Young, 141 Ill. 188, 194, 30 N. E. 538, 16 L. R. A. 492; Trumbull v. Erickson, 97 Fed. 891; Fleming v. Dixon, 194 Pa. St. 67, 44 Atl. 1064; Reilly v. Conway, 121 Mich. 682, 80 N. W. 785; Duncan v. Borden, 13 Colo. App. 481, 59 Pac. 60; Gordon v. Burris, 153 Mo. 223, 54 S. W. 546; Ronsh v. Ronsh, 154 Ind. 562, 55 N. E. 1017; Pecha v. Kastl, 64 Neb. 380, 89 N. W. 1047; S. v. Rathbone (Idaho), 67 Pac. 186; Union Pac. R. Co. v. Ruzicka (Neb.), 91 N. W. 543; Chicago T. T. Co. v. Kotoski, 199 Ill. 383, 65 N. E. 350; Chicago T. T. Co. v. Gruss (Ill.), 65 N. E. 693; Greaney v. Holyoke Water Power Co. 174 Mass. 437, 54 N. E. 880; Breedlove v. Dennie, 2 Indian Ter. 606, 53 S. W. 436; O'Neil v. Hanscom, 175 Mass. 313, 56 N. E. 587; City of Chicago v. Hastings, 136 Ill. 251, 254, 26 N. E. 594; City of Madison v. Moore, 109 Iowa, 476, 80 N. W. 257; Gemmill v. Brown (Ind.), 56 N. E. 691; Gordon v. Alexander, 122 Mich. 107, 80 N. W. 978; Ittner v. Hughes, 154 Mo. 55, 55 S. W. 267; Hicks v. Nassau Electric R. Co. 62 N. Y. S. 597; Clifford v. Minneapolis, St. P. and S. S. R. Co. 105 Wis. 618, 81 N. W. 143; Kansas City, Ft. S. & M. R. Co. v. Chamberlin, 61 Kas. 859, 60 Pac. 15; Griffin v. Manice, 62 N. Y. S. 364; Anson v. P. 148 Ill. 494, 508, 35 N. E. 145; Robinson v. Brewster, 140 Ill. 649, 660, 30 N. E. 683, 33 Am. St. 265; Thrawley v. S. 153 Ind. 375, 55 N. E. 95; P. v. Hettick, 126 Cal. 425, 58 Pac. 918; Thompson v. P. 26 Colo. 496, 59 Pac. 57; Buel v. S. 104 Wis. 132, 80 N. W. 78; Miller v. S. 106 Wis. 156, 81 N. W. 1020; Drye v. S. (Tex. Cr. App.), 55 S. W. 65; Louisville & N. R. Co. v. Cowherd, 120 Ala. 51, 23 So. 793; Childs v. Muckler, 105 Iowa, 279, 75 N. W. 100; Hummel v. Stern, 48 N. Y. S. 528; Wade v. Columbia Electric St. R. Light & Power Co. 51 S. Car. 296, 29 S. E. 233, 64 Am. St. 676; Franklin v. Krum, 171 Ill. 378, 49 N. E. 513; Starrette Co. v. O'Rourke, 172 Ill. 177, 50 N. E. 242; Saunders v. Closs, 117 Mich. 130, 75 N. W. 295; Rogers v. S. 117 Ala. 192, 23 So. 82; Levi v. Gardner, 53 S. Car. 24, 30 S. E. 617; Chicago & E. R. Co. v. Holland, 122 Ill. 461, 471, 13 N. E. 145; Smith v. Hall, 69 Conn. 651, 38 Atl. 386; Chicago, M. & St. P. R. Co. v. Krueger, 124 Ill. 457, 17 N. E. 52; Perin v. Parker, 126 Ill. 201, 213, 18 N. E. 747, 9 Am. St. 571; Chicago & N. R. Co. v. Dunleavy, 129 Ill. 132, 150, 22 N. E. 15; Keastner v. First National Bank, 170 Ill. 322, 48 N. E. 998; Mason v. Jones, 36 Ill. 212; City of Peoria v. Gerber, 168 Ill. 318, 48 N. E. 152; Jacobson v. Gunzburg, 150 Ill. 135, 37 N. E. 229; James v. Gilbert, 168 Ill. 627, 48 N. E. 177; Chicago, St. P. & K. City R. Co. v. Ryan, 165 Ill. 88, 46 N. E. 208; West Chicago St. R. Co. v. Nash, 166 Ill. 528, 46 N. E. 1082; Taylor v. Felsing, 164 Ill. 331, 338, 45 N. E. 161; National Linseed Oil Co. v. McBlaine, 164 Ill. 597, 602, 45 N. E. 1015; Ashley Wire Co. v. Mercier, 163 Ill. 487, 45 N. E. 222; West C. St. R. Co. v. Estep, 162 Ill. 131, 44 N. E. 404; Wrigley v. Comelins, 162 Ill. 92, 44 N. E. 406; West C. St. R. Co. v. Dwyer, 162 Ill. 482, 490, 44 N. E. 815; Village of Cullom v. Justice, 161 Ill. 372, 43 N. E. 1098; Grier v. Cable, 159 Ill. 29, 38, 42 N. E. 395; Pyle

instruction tells the jury what facts would constitute negligence

v. Pyle, 158 Ill. 289, 300, 41 N. E. 999; Baltimore & O. R. Co. v. Stanley, 158 Ill., 396, 400, 41 N. E. 1012; St. L. A. & T. H. R. Co. v. Barrett, 152 Ill. 168, 38 N. E. 554; Burke v. Sanitary District, 152 Ill. 125, 134, 38 N. E. 670; Taylor v. Pegram, 151 Ill. 106, 121, 37 N. E. 837; Carlton v. P. 150 Ill. 181, 191, 37 N. E. 244, 41 Am. St. 346; Shorb v. Webber, 188 Ill. 126, 58 N. E. 949; Atchison, T. & S. Fe R. Co. v. Feehan, 149 Ill. 202, 213, 36 N. E. 1036; Cheshire v. Tappan, 94 Ga. 704, 19 S. E. 992; Chambers v. S. (Tex. Cr. App.), 44 S. W. 495; S. v. Bauerle, 145 Mo. 1, 46 S. W. 609; S. v. Cushing, 17 Wash. 544, 50 Pac. 514; Watkins v. U. S. 5 Okla. 729, 50 Pac. 88; Long v. S. (Tex. Cr. App), 46 S. W. 640; Stevens v. Com. 20 Ky. L. R. 48, 45 S. W. 76; Simnacher v. S. (Tex. Cr. App.), 43 S. W. 354; Travess v. U. S. 6 App. Cas. (D. C.) 450; Taylor v. S. (Tex. Cr. App.), 42 S. W. 285; S. v. Bowser, 21 Mont. 133, 53 Pac. 179; S. v. Fogerty, 105 Iowa, 32, 74 N. W. 754; McAlpine v. S. 117 Ala. 93, 23 So. 130; P. v. Prather, 120 Cal. 660, 53 Pac. 259; Harris v. U. S. 8 App. Cas. (D. C) 20, 36 L. R. A. 465; Burton v. S. 118 Ala. 109, 23 So. 729; P. v. Barthleman, 120 Cal. 752 Pac. 112; Toll v. S. 40 Fla. 169, 23 So. 943; Beard v. Trustees of School, 106 Ill. 659; City of Chicago v. Stearns, 105 Ill. 554, 559; Hayward v. Merrill, 94 Ill. 349, 356, 34 Am. R. 229; Freidberg v. P. 102 Ill. 160, 164; Richmond v. Roberts, 98 Ill. 472, 478; Frank & Sons, v. Welch, 89 Ill. 38; S. v. Webb, 20 Wash. 484, 55 Pac. 935; Carter v. S. 106 Ga. 372, 32 S. E. 345, 71 Am. St. 262; P. v. Chaves, 122 Cal. 134, 54 Pac. 596; S. v. Branton, 33 Ore. 533, 56 Pac. 267, 43 L. R. A. 128; Dennis v. S. 118 Ala. 72, 23 So. 1002; Com. v. Magoon, 172 Mass. 214, 51 N. E. 1082; S. v. Burlingame, 146 Mo. 207, 48 S. W. 72; S. v. Booker, 123 N. Car. 713, 31 S. E. 376; Battle v. S. 105 Ga. 703, 32 S. E. 160; S. v. Cochran, 147 Mo. 504, 49 S. W. 558; Donaho v. S. (Tex. Cr. App.), 47 S. W. 469; S. v. Staley, 45 W. Va. 792, 32 S. E. 198; Holcomb v. P. 79 Ill. 409, 416; Underwood v. White, 45 Ill. 438; Allen v. P. 77 Ill. 484, 487; Keller v. Stuppe, 86 Ill. 309, 311; Scott v. Delany, 87 Ill. 146; S. v. Tucker 36 Ore. 291, 61 Pac. 894, 51 L. R. A. 246; Castlin v. S. (Tex. Cr. App.), 57 S. W. 827; Stevens v. S. (Tex. Cr. App.), 58 S. W. 96; S. v. West, 157 Mo. 309, 57 S. W. 1071; Whitney v. S. 154 Ind. 573, 57 N. E. 398; S. v. Peterson, 110 Iowa, 649, 82 N. W. 329; Blume v. S. 154 Ind. 343, 56 N. E. 771; S. v. Mahoney, 24 Mont. 281, 61 Pac. 647; Liner v. S. 124 Ala. 1, 27 So. 438; West C. St. R. Co. v. Nash, 166 Ill. 528, 46 N. E. 1082; Goldsmith v. City of New York, 43 N. Y. S. 447, 14 App. Div. 135; Koch v. S. 115 Ala. 99, 22 So. 471; Diggers v. S. 38 Fla. 7, 20 So. 758; Hinshaw v. S. 147 Ind. 334, 47 N. E. 157; Yoakum v. Kelly (Tex. Cv. App.), 30 S. W. 836; S. v. Case, 99 Iowa, 743, 68 N. W. 434; Cox v. Chicago & N. W. R. Co. 95 Iowa, 54, 63 N. W. 450; Tobey v. Burlington, C. R. & N. R. Co. 94 Iowa, 256, 62 N. W. 761, 33 L. R. A. 496; Lazarus v. Pheps, 156 U. S. 202, 15 S. Ct. 271; Hoenn v. Chicago, P. St. L. R. Co. 152 Ill. 223, 38 N. E. 549; Young v. Sage, 42 Neb. 37, 60 N. W. 313; Ronnsaville v. Walters, 94 Ga. 707, 20 S. E. 93; St. Louis, A. & T. H. R. Co. v. Barrett, 152 Ill. 168, 38 N. E. 554; Hodgman, v. Thomas, 37 Neb. 568, 56 N. W. 199; Wheeler v. Grand T. R. Co. 70 N. H. 607, 50 Atl. 103, 54 L. R. A. 955; Puff v. Lehigh V. R. Co. 24 N. Y. S. 1068, 71 Hun, (N. Y.) 577; Faulkner v. Mammoth, 23 Utah, 437, 66 Pac. 799; Brown v. U. S. 150 U. S. 93, 14 Sup. Ct. 37; French v. Seattle Tr. Co. 26 Wash. 264, 66 Pac. 404; Brown v. Porter, 7 Wash. 327, 34 Pac. 1105; Maxwell v. Cunningham, 50 W. Va. 298, 40 S. E. 499; Bluedom v. Missouri Pac. R. Co. (Mo.), 24 S. W. 57; Warden v. Miller, 112 Wis. 67, 87 N.

on the part of the defendant.[98] Or in a personal injury case the refusal of an instruction that the plaintiff cannot be held to have assumed any extraordinary danger if it appears that he did not know and appreciate such danger is not error, where in other instructions the court charges that if the plaintiff knew the risk and voluntarily assumed it, he cannot recover, and if he did not know it he can recover.[99]

The frequent repetition of a correct principle of law may be material error. Such practice gives undue prominence to the facts or subject matter to which the instruction relates, and tends to mislead the jury, indicating that, in the opinion of the court, one of the parties has the advantage over the other on the evidence relating to the particular question involved.[100] The repetition in a special instruction of matters as to a certain element or defense which has been fully covered in the general charge is error.[101]

W. 828; Vredenburge v. Pall, 28 N. Y. S. 88, 7 Misc. 567; Walbert v. Trexler, 156 Pa. St. 112, 27 Atl. 65; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978; Largey v. Mantle, 26 Mont. 264, 67 Pac. 114; Indianapolis St. R. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936; Lovick v. Atlantic Coast L. R. Co. 129 N. Car. 427, 40 S. E. 191; Cook v. Los Angeles & P. E. R. Co. 134 Cal. 279, 66 Pac. 306, 86 Am. St. 246; Keesley v. Doyle, 8 Ind. App. 43, 35 N. E. 126; Kischman v. Scott, 166 Mo. 214, 65 S. W. 1031; General Fire E. Co. v. Schwartz 165 Mo. 121, 65 S. W. 318; Louisville & N. R. Co. v. Pittman, 23 Ky. L. R. 877, 64 S. W. 460; Farmers' Bank v. Garrow, 63 Neb. 64, 88 N. W. 131; Collins v. City of Janesville, 111 Wis. 348, 87 N. W. 241; Missouri, K. & T. R. Co. v. Avery (Tex. Cv. App.), 64 S. W. 935; McLane v. Maurer (Tex. Cv. App.), 66 S. W. 693; Daugherty v. Herndon, 27 Tex. Cv. App. 175, 65 S. W. 891; Vetterly v. McNeal, 129 Mich. 507, 89 N. W. 441; St. Louis & S. W. R. Co. v. Ferguson, 26 Tex. Cv. App. 460, 64 S. W. 797; Murray v. Boston Ice Co. 180 Mass. 165, 61 N. E. 1001, 91 Am. St. 269; McGee v. Smitherman, 69 Ark. 636, 65 S. W. 461; S. v. Howell, 26 Mont. 3, 66 Pac. 291; S. v. Dotson, 26 Mont. 305, 67 Pac. 938; S. v. Hendricks, 172 Mo. 654, 73 S. W. 194 (evidence circumstantial); Jacksonville & St. L. R. Co.R. Co. v. Wilhite, 209 Ill. 87; Illinois I & M. R. Co. v. Freeman, 210 Ill. 270, 277; Chicago U. T. R. Co. v. Reuter, 210 Ill. 279, 282.

[98] St. Clair M. S. Co. v. City of St. Clair, 96 Mich. 463, 56 N. W. 18.

[99] Breen v. Field, 159 Mass. 582, 35 N. E. 95.

[100] Cross v. Kennedy (Tex. Cv. App.), 66 S. W. 318; Chisum v. Chestnut (Tex. Cv. App.), 36 S. W. 758; Gulf C. S. & T. R. Co. v. Harriett, 80 Tex. 81, 15 S. W. 556; Pelfrey v. Texas C. R. Co. (Tex. Cv. App.), 73 S. W. 411; Chapman v. Conway, 50 Ill. 513; Kraus v. Haas, 6 Tex. Cv. App. 665, 25 S. W. 1025; Mendes v. Kyle, 16 Nev. 370 (the repetitions are set out in the opinion in this case); Chicago, W. & V. C. Co. v. Moran, 210 Ill. 9, 14; Kroeger v. Texas &c. R. Co. 30 Tex. Cv. App. 87, 69 S. W. 809; Miller v. Coulter, 156 Ind. 290, 59 N. E. 853.

[101] Highland v. Houston E. & W. T. R. Co. (Tex. Cv. App.), 65

The practice of repeating and reiterating in a charge the principle of law applicable to a particular issue has been uniformly condemned, because it is likely to lead the jury to believe that in the opinion of the court the evidence in the case establishes facts which require the application of the proposition of law thus sought to be impressed upon the minds of the jury. Such repetition emphasizes and gives undue prominence to the question to which it refers.[102] But, on the contrary, such repetition of a proposition several times in an instruction is not ordinarily such error as will be ground for reversal where it occurs in connection with facts or questions involved in the case.[103] Nor does the repetition of the same principles or rules of law in different instructions ordinarily render the charge erroneous.[104]

§ 26. Repetition—When, general and special charge.—Where the general charge fully covers all the legal principles embraced in a special charge it is not eror to refuse the latter.[105] And if the general charge contains all the legal principles embodied

S. W. 649; Wadsworth v. Williams, 101 Ala. 264, 13 So. 755.

[102] Kroeger v. Tex. &c. R. Co. 30 Tex. Cv. App. 87, 69 S. W. 809; Irvine v. S. 20 Tex. App. 12; Shenkenberger v. S. 154 Ind. 630, 642, 57 N. E. 519; Traylor v. Townsend, 61 Tex. 147.

[103] Denise v. City of Omaha, 49 Neb. 750, 69 N. W. 119; Maes v. Texas & N. O. R. Co. (Tex. Cv. App.), 23 S. W. 725. See Murray v. New York, L. & W. R. Co. 103 Pa. St. 37; see Gaudy v. Bissell's Estate (Neb.), 97 N. W. 632; Sonka v. Sonka (Tex. Cv. App.), 75 S. W. 325; Herbert v. Drew, 32 Ind. 364.

[104] Nashville St. R. Co. v. O'Bryan, 104 Tenn. 28, 55 S. W. 300; Coffman v. Reeves, 62 Ind. 334; Louisville & N. R. Co. v. Foley, 88 Fed. 240; Keating v. S. (Neb.), 93 N. W. 980, (credibility of defendant as a witness); Murray v. New York, L. & W. R. Co. 103 Pa. St. 37.

[105] Noble v. Worthy, 1 Indian Ter. 458, 45 S. W. 137; Dorrance v. McAlister, 1 Indian Ter. 473, 45 S. W. 141; Saunder v. Closs, 117 Mich. 130, 75 N. W. 295; Louisville & N. R. Co. v. Cowherd, 120 Ala. 51, 23 So. 793; Anacostia & P. R. Co. v. Klein, 8 App. Cas. (D. C.) 75; Johnson v. S. (Tex. Cr. App.), 45 S. W. 901; Costello v. Kottas, 52 Neb. 15, 71 N. W. 950; Miller v. Miller, 17 Ind. App. 605, 47 N. E. 338; Canfield v. City of Jackson, 112 Mich. 120, 70 N. W. 444; Com. v. Carter, (Mass.), 66 N. E. 716; Richmond Tr. Co. v. Wilkinson, (Va.), 43 S. E. 622; Gulf, C. & S. F. R. Co. v. Holt, (Tex. Civ. App.), 70 S. W. 591; Schultz v. Bower, 64 Minn. 123, 66 N. W. 139; Jackson v. Jackson, 82 Md. 17, 33 Atl. 317, 34 L. R. A. 773; Woodworth v. Parrott, 48 Neb. 675, 67 N. W. 761; La Grande Nat. Bank v. Blum, 24 Ore. 215, 41 Pac. 659, 50 Am. St. 710; Garbaczewski v. Third Ave. R. Co. 39 N. Y. S. 33, 5 App. Div. 186; Gulf C. & S. F. R. Co. v. Duvall, 12 Tex. Civ. App. 348, 35 S. W. 649; Norton v. North Carolina R. Co. 122 N. Car. 910, 29 S. E. 886; Terrell v. McCowen, 91 Tex. 231, 43 S. W. 2; Barnes v. S. 39 Tex. Cr. App. 342, 45 S. W. 495; S. v. Fontenot, 50 La. Ann. 537,

in the special charge, though differing somewhat in form and wording, the special charge is properly refused.[106]

A special request for a charge that a fact may be proved by circumstantial evidence may be refused where the same fact is properly submitted by other instructions.[106*] But if the general charge does not fully cover all the issues involved which the evidence tends to establish, the court, when requested, should give further instructions.[107] And in a criminal case where the identity of the accused is the material issue, a special charge on that issue should be given where the punishment for the crime charged is practically equivalent to a life sentence.[108] So where the general charge states that the plaintiff must prove the facts of the alleged negligence in order to recover, the refusal to instruct the jury that proof of mere injury would not raise a presumption of negligence, is not error, the general charge covering the refused instruction.[109] So also in a case where the questions involved are very simple and the evidence is limited to a small compass, the refusal to instruct the jury how they should find in the event they should determine the facts the one way or the other, is not error, where previous to the request

23 So. 634, 69 Am. St. 435; S. v. Cannon, 52 S. Car. 452, 30 S. E. 589; Baltimore & O. R. Co. v. Hollenthal, 88 Fed. 116; Taylor v. S. 97 Ga. 432, 25 S. E. 320, 54 Am. St. 433; Harper v. S. (Tex. Cr. App.), 40 S. W. 272; Producer's Marble Co. v. Bergen (Tex. Cv. App.), 31 S. W. 89; Westra v. Westra Estate, 101 Mich. 526, 60 N. W. 53; Messmann v. Ihlenfeldt, 89 Wis. 585, 62 N. W. 522; Wimbish v. Hamilton, 47 La. Ann. 246, 16 S. 856; Savannah St. R. Co. v. Ficklin, 94 Ga. 146, 20 S. E. 646; Hay v. Carolina M. R. Co. 41 S. Car. 542, 19 S. E. 976; Rogers v. Black, 99 Ga. 139, 25 S. E. 23; Johnson v. Galveston H. & N. R. Co. 27 Tex. Cv. App. 616, 66 S. W. 906; Southern R. Co. v. Coursey, 115 Ga. 602, 41 S. E. 1013; Missouri, K. & T. R. Co. v. Walden (Tex. Cv. App.), 66 S. W. 584; Missouri Pac. R. Co. v. Hildebrand, 52 Kas. 284, 34 Pac. 738; Chicago, &c. R. Co. v. Groves, 56 Kas. 601, 44 Pac. 628; S. v. Vincent (S. Dak.), 91 N. W. 347; Wunderlich v. Palatine Ins. Co. 115 Wis. 509, 92 N. W. 264; S. v. Caymo, 108 La. Ann. 218, 32 So. 357, 61 L. R. A. 781; Seefeld v. Thacker, 93 Wis. 518, 67 N. W. 1142; Stephens v. Anderson (Tex. Cv. App.), 36 S. W. 1000; Wellston Coal Co. v. Smith, 65 Ohio St. 81, 61 N. E. 143 87 Am. St. 547, 55 L. R. A. 99.

106 Kenyon v. City of Mondovi, 98 Wis. 50, 73 N. W. 314; Chicago, R. I. & P. R. Co. v. Parks, 59 Kas. 790, 54 Pac. 1052; S. v. Cannon, 52 S. Car. 452, 30 S. E. 589.

106* Smith v. Richardson Lumber Co. (Tex. Cv. App.), 47 S. W. 386.

107 Carrell v. Kalamazoo Cold Storage Co. 112, Mich. 34, 70 N. W. 323, 67 Am. St. 381, 36 L. R. A. 523.

108 Ford v. S. 101 Tenn. 454, 47 S. W. 713.

109 Louisville & N. R. Co. v. Ray, 101 Tenn. 1, 46 S. W. 554; S. v. Dudoussat, 47 La. Ann. 977, 17 So. 685.

the court had stated the general propositions of law applicable to the issues in the case.[110]

§ 26a. **Repetition when evidence is close.**—But where the subject matter is covered only in general and abstract terms by instructions, a special request should not be refused where the evidence is close as to the facts of the matter on which the special request is made.[111]

§ 26b. **Court may refuse all instructions.**—It is not error for the court to refuse all the instructions asked by a party and prepare and give a full charge on its own motion, but the instructions thus given must fully cover the law of the case.[111*] And the court may refuse all the instructions asked by both of the parties and prepare others on its own motion, and there will be no ground for error.[112] But, of course, it is error if the court in charging the jury on its own motion fails to embody all the questions of law properly presented in the refused instructions. For instance, where the court, after instructing the jury for both parties, gives an instruction on its own motion, remarking as follows: "I have taken upon myself to concentrate all there is in those instructions into this one, as embodying all the law necessary for this case," it is error, when as a matter of fact the instruction thus given did not state all the law applicable to the case.[113] The court may properly ask the views of opposing counsel as to the propriety of giving certain instructions.[114]

§ 27. **Defective instructions refused.**—If an instruction is materially defective or imperfect in any particular, the court is not bound to give it.[115] The court is not bound to correct a

[110] Smith v. Gray, 46 N. Y. S. 180, 19 App. Div. 262.

[111] Snowden v. Waterman, 105 Ga. 384, 31 S. E. 110; Souey v. S. 13 Lea (Tenn.) 472.

[111*] Pennsylvania Co. v. Versten, 140 Ill. 641, 30 N. E. 540, 15 L. R. A. 798; North Chicago St. R. Co. v. Louis, 138 Ill. 12, 27 N. E. 451; Hill v. Parson, 110 Ill. 111; Pennsylvania Co. v. Rudel, 100 Ill. 609; Bromley v. Goodwin, 95 Ill. 122; Key v. Dent, 6 Md. 142.

[112] Wacaser v. P. 134 Ill. 438, 25 N. E. 564, 23 Am. St. 683, 10 L. R. A. 696; Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 329, 18 N. E. 804, 9 Am. St. 587; S. v. Collins, 20 Iowa, 85; Fowler v. Hoffman, 31 Mich. 215.

[113] McEwen v. Morey, 60 Ill. 38.

[114] Sullivan v. McManers, 45 N. Y. S. 1079, 19 App. Div. 167; East Tenn. V. & G. R. Co. v. Gurley, 12 Lea (Tenn.) 46.

[115] Freidman v. Weisz, 8 Okla. 392, 58 Pac. 613; Howe v. West S. Land & I. Co. 21 Wash. 594, 59 Pac. 495; Preston v. Dunham, 52 Ala. 217; Wittleder v. Citizens' Elec.

faulty instruction requested.[116] An instruction which omits any material element or fact on the subject to which it relates is defective, and for that reason is properly refused.[117] Such defective instructions, though correct in other respects, may be refused.[118] And a defective instruction is properly refused, although the court may have previously indicated that it would be given;[119] or it may be modified, although the court had indicated that it would be given as requested.[120]

§ 28. Clauses or paragraph defective.—And where an instruction is divided into several clauses or propositions it may be refused if any one of such propositions be erroneous.[121] But it is generally the better practice to give the good and refuse the bad of such instructions.[122] And it has been held that where

Ill. Co. 62 N. Y. S. 297; Stanton v. Southern R. Co. 56 S. Car. 398, 34 S. E. 695; Keithley v. Stafford, 126 Ill. 507, 524, 18 N. E. 740 (will contest); Tutwiler Coal C. & I. Co. v. Enslen, 129 Ala. 336, 30 S. E. 600; Charter v. Lane, 62 Conn. 121, 25 Atl. 464; Thompson v. O'Conner, 115 Ga. 120, 41 S. E. 242; Earle v. Poat, 63 S. Car. 439, 41 S. E. 525, 90 Am. St. 681; Christian v. S. 7 Ind. App. 417, 34 N. E. 825; Terrill v. Tillson (Vt.), 54 Atl. 187; Ricketts v. Harvey, 106 Ind. 564, 6 N. E. 325; Over v. Schiffling, 102 Ind. 194, 26 N. E. 91; Cleveland & Pittsburg R. Co. v. Sargent, 19 Ohio St. 452; Eckels v. S. 20 Ohio St. 508; Railroad Co. v. Shultz, 43 Ohio St. 273, 1 N. E. 324, 54 Am. R. 805; Barnes v. S. 103 Ala. 44, 15 So. 901; P. v. Harlan, 133 Cal. 16, 65 Pac 9; Underwood v. Hart, 23 Vt. 120; Tower v. Haslam, 84 Me. 86, 24 Atl. 587; Mariner v. Dennison, 78 Cal. 202, 20 Pac. 386.

[116] Harris v. First N. Bank (Tex. Cv. App.), 45 S. W. 311; Barth v. Kansas City E. R. Co. 142 Mo. 535, 44 S. W. 778; McGee v. Wells, 52 S. Car. 472, 30 S. E. 602; Amsden v. Atwood, 69 Vt. 527, 38 Atl. 263; Alabama S. L. Co. v. Slaton, 120 Ala. 259, 24 So. 720, 74 Am. St. 31; Croft v. Northwestern S. S. Co. 20 Wash. 175, 55 Pac 42; Milmo N. Bank, v. Convery (Tex Cv. App.), 49 S. W. 926; Waco A. Water Co. v. Cauble, 19 Tex. Cv. App. 317, 47 S. W. 538; Kluse v. Sparks, 10 Ind. App. 444, 37 N. E. 1047; Mosier v. Stall, 119 Ind. 244, 20 N. E. 752; Callan v. McDaniel, 72 Ala. 96; Rolfe v. Rich, 149 Ill. 496, 35 N. E. 352; Douglas v. Wolf, 6 Kas. 88.

[117] American Bible Society v. Price, 115 Ill. 623, 638, 5 N. E. 126; Britton v. S. 61 Ark. 15, 31 S. W. 569; Jacobi v. S. 133 Ala. 1, 32 So. 158; Thomas v. S. 133 Ala. 139, 32 So. 250; S. v. Burns (Nev.), 74 Pac. 984.

[118] S. v Nichols, 50 La. Ann. 699, 23 So. 980; S. v. Neal, 120 N. Car. 613, 27 S. E. 81, 58 Am. St. 810.

[119] Louisville, N. A. & C. R. Co. v. Hubbard, 116 Ind. 193, 18 N. E. 611; Carleton v. S. 43 Neb. 373, 61 N. W. 699.

[120] City of Logansport v. Dykeman, 116 Ind. 26, 17 N. E. 587.

[121] Riviere v. Missouri, K. & T. R. Co. (Tex. Cv. App.), 40 S. W. 1074; Inglebright v. Hammond, 19 Ohio, 346, 53 Am. Dec. 430; Consolidated Tr. Co. v. Chenowith (N. J.), 34 Atl. 817; Boyden v. Fitchburg R. Co. 72 Vt. 89, 47 Atl. 409. Contra: Burnham v. Logan, 88 Tex. 1, 29 S. W. 1067; Sword v. Keith, 31 Mich. 247; Peshine v. Shepperson, 17 Gratt. (Va.) 472, 94 Am. Dec. 468.

[122] Walker v. Devlin, 2 Ohio St. 593; Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 22 S. E. 767,

instructions are requested in the aggregate (apparently one entire charge) if any part thereof is erroneous it is not error to refuse the entire charge.[123]

Also where the requested instruction contains two propositions, a correct and incorrect one, so united that the court, in passing upon one of them, will be required also to pass upon the other, the whole instruction may be refused.[124] Or where several propositions of law are requested in one charge as a whole, if any part of the charge is erroneous, the whole may be refused.[125] In Texas, if several instructions are written on separate sheets and fastened together and the last one is signed, as required by statute, all may be refused if one of them is improper.[126]

§ 29. **Incomplete instruction defective.**—Or it is proper to refuse an instruction which is but an incomplete statement of the law on the point in question.[127] Thus, where in one count of an indictment the defendant is charged with unlawfully altering the mark on a sheep and in another count with stealing the sheep, an instruction that if the jury have a reasonable doubt of the defendant's guilt from the evidence, they should acquit him, is properly refused, in that it is not a complete statement of the law covering both charges as stated in the indictment.[128] It has been held that if an instruction be incomplete the opposing or complaining party should request the court to modify it so as to make it conform to the law.[129]

§ 30. **Modifying defective instructions.**—But instead of re-

31 L. R. A. 577 (not the duty of the court to eliminate the defective part of a charge); Houston & T. C. R. Co. v. Kelly, 13 Tex. Cv. App. 1, 34 S. W. 809; French v. Millard, 2 Ohio St. 44.

123 P. v. Thiede, 11 Utah, 241, 39 Pac. 837; S. v. Watkins, 106 La. 380, 31 So. 10; Price v. S. 107 Ala. 161, 18 So. 130; Bedford v. Penny, 58 Mich. 424, 25 N. W. 381; Williamson v. Toby, 86 Cal. 497, 25 Pac. 65.

124 Burnham v. Logan (Tex. Cv. App.), 29 S. W. 1067.

125 Oliver v. S. 38 Fla. 46, 20 So. 803; Lanyon v. Edwards (Tex. Cv. App.), 26 S. W. 524; Yarborough v. Weaver, 6 Tex. Cv. App. 215, 25 S. W. 468; Price v. S. 107 Ala. 161, 18 So. 130; Inglebright v. Hammond, 19 Ohio, 337, 53 Am. Dec. 430.

126 International & G. N. R. Co. v. Niff (Tex. Cv. App.), 26 S. W. 784; Missouri P. R. Co. v. King, 2 Tex. Cv. App. 122, 23 S. W. 917.

127 Keithley v. Stafford, 126 Ill. 524, 18 N. E. 740; Hooper v. S. 106 Ala. 41, 17 So. 679, 34 L. R. A. 634; Kelly v. Palmer (Minn.), 97 N. W. 578.

128 Barnes v. S. 103 Ala. 44, 15 So. 901.

129 Baltimore & O. S. W. R. Co. v. Young, 153 Ind. 163, 54 N. E. 791.

fusing a defective instruction the court may modify it in such manner as will cure the defect and give it as modified; and if the instruction as modified correctly states the law, there can be no ground for complaint.[130] The modification may consist of striking out any objectionable word, phrase or clause, as for instance, "as testified to by the justice."[131] An instruction as to whether an injury was caused by accident may be modified by adding to it a definition of the term "accident."[132] The modification of an instruction by substituting "due care" for "ordinary care" is not error.[133] And where the court modifies an instruction for the purpose of reconciling it with others asked by the complaining party, such modification cannot be urged as ground for error, although the modification may be improper.[134] Nor will a party be allowed to complain of a modification of one of his instructions to make it conform to another asked by him.[135]

§ 31. **Modifying correct instructions.**—But should the court modify a correct instruction, the modification will be regarded as immaterial if it in no manner changes the meaning of the instruction as originally requested.[136] The modification of an

[130] Crown C. & C. Co. v. Taylor, 184 Ill. 250, 56 N. E. 388; Illinois Cent. R. Co. v. McClelland, 42 Ill. 359; Morgan v. Peet, 32 Ill. 287; Hinshaw v. S. 147 Ind. 334, 47 N. E. 157; Conkey Co. v. Bueherer, 84 Ill. App. 633; Meigs v. Dexter, 172 Mass. 217, 52 N. E. 75; Cook v. Los Angeles & P. E. R. Co. 134 Cal. 279, 66 Pac. 306; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580; Eilard v. S. 52 Ala. 330; Brown v. S. 72 Miss. 990, 18 So. 431; Jansen v. Grimshaw, 125 Ill. 468, 17 N. E. 850; Evans v. Givens, 22 Fla. 476; P. v. Hall, 94 Cal. 595, 30 Pac. 7; Large v. Moore, 17 Iowa, 258; Musgrave v. S. 133 Ind. 297, 32 N. E. 885; Evans v. Montgomery, 95 Mich. 497, 55 N. W. 362; Lacewell v. S. 95 Ga. 346, 22 S. E. 546; S. v. Horton, 100 N. Car. 443, 6 S. E. 238, 6 Am. St. 613; S. v. Smith, 10 Nev. 123; Kimmel v. P. 92 Ill. 457; Chicago, B. & Q. R. Co. v. Bundy, 210 Ill. 49.

[131] Lovick v. Atlantic C. L. R. Co. 129 N. Car. 427, 40 S. E. 191.

[132] Barnett & R. Co. v. Schlapka, 208 Ill. 436.

[133] St. Louis, I. M. & S. R. Co. v. Warren, 65 Ark. 619, 48 S. W. 222.

[134] Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166; Louisville, N. O. & T. R. Co. v. Suddoth, 70 Miss. 265, 12 So. 333.

[135] Judy v. Sterrett, 153 Ill. 94, 38 N. E. 633. See Cicero & P. St. R. Co. v. Meixner, 160 Ill. 320, 43 N. E. 823, 31 L. R. A. 331; Hamilton v. Hartinger, 96 Iowa, 7, 64 N. W. 592, 59 Am. St. 348; Feary v. Metropolitan St. R. Co. 162 Mo. 75.

[136] Chicago & A. R. Co. v. Fietsam, 123 Ill. 518, 15 N. E. 169; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226, 4 N. E. 840; Chicago, B. & Q. R. Co. v. Avery, 109 Ill. 322; P. v. Ashmead, 118 Cal. 508, 50 Pac. 681; Dillingham v. Fields, 9 Tex. Cv. App. 1, 29 S. W. 214; Brink v. Black, 77

instruction which ought to be given as asked is not material error if it states the law substantially as the one requested.[137]

And if the modification correctly states the law pertinent to the issue and is applicable to the evidence, and does not interfere with a comprehension of the legal proposition as submitted before modification, there is no ground for error.[138] But it is error to modify an instruction by adding to it a material qualification unauthorized by the evidence.[139] The modification of an instruction in such manner as to introduce an element in the case which finds no support in the evidence is error.[140]

§ 32. In language of request.—The court is not bound to give instructions in the language of the request unless required by statute or local practice to do so, but may modify them.[141] In some jurisdictions it is held that instructions must be given in the exact language of the request;[142] and where the requested instructions are pertinent and correctly state the law, they should be given in the language as submitted, instead of the

N. Car. 59; Chicago, R. I. & P. R. Co. v. Kinnare, 90 Ill. 9; S. v. Fannon, 158 Mo. 149; P. v. Davis, 47 Cal. 93.

137 S. v. Wilson, 3 Ill. (2 Scam.) 225; Meul v. P. 198 Ill. 258, 64 N. E. 1106; Fells Point S. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 597; P. v. Stewart, 75 Mich. 29, 42 N. W. 662; Jamson v. Quivey, 5 Cal. 490; S. v. Davis (N. Car.), 46 S. E. 722; S. v. Hicks, 130 N. Car. 710, 41 S. E. 803.

138 Myer v. Mead, 83 Ill. 19, 21. See Creed v. P. 81 Ill. 565, 569; P. v. Williams, 17 Cal. 142; Cook v. Brown, 62 Mich. 477, 29 N. W. 46, 4 Am. St. 870.

139 Walker v. Stetson, 14 Ohio St. 100; McHugh v. S. 42 Ohio St. 152 (an alteration of an instruction is the same as a refusal). See Chicago, W. V. C. Co. v. Moran, 210 Ill. 9, 14, (improper modification of an irrelevant instruction is not error).

140 Badger v. Batavia Paper Mfg. Co. 70 Ill. 302, 305.

141 S. v. Petsch, 43 S. Car. 132, 20 S. E. 993; S. v. Mills, 116 N. Car. 992, 21 S. E. 106; Lou v. Grimes Drygoods Co. 38 Neb. 215, 56 N. W. 954; Carroll v. Tucker, 26 N. Y. S. 86, 6 Misc. 613; Percival v. Chase, 182 Mass. 371, 65 N. E. 800; Davenport v. Johnson, 182 Mass. 269, 65 N. E. 392; McDonald v. New York, N. H. & H. R. Co. (R. I.), 54 Atl. 795; Edwards v. Wessinger, 65 S. Car. 161, 43 S. E. 518, 95 Am. St. 789; S. v. Stout, 49 Ohio St. 283, 30 N. E. 437; McHugh v. S. 42 Ohio St. 154; Crisman v. McDonald, 28 Ark. 8; Jackson v. Com. 17 Ky. L. R. 1197, 34 S. W. 14; Robinson v. S. 82 Ga. 535, 9 S. E. 528; Bond v. S. 23 Ohio St. 349, 13 Am. R. 253.

142 Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127; Lake S. & M. S. R. Co. v. Shultz, 19 Ohio. C. C. 639; Bush v. Glover, 47 Ala. 167, 11 Am. R. 768; Rogers v. Brightman, 10 Wis. 55; East Tenn. V. & G. R. Co. v. Bayless, 77 Ala. 430, 54 Am. R. 69; P. v. Stewart, 75 Mich. 21, 42 N. W. 662; Baltimore & O. R. Co. v. Laffertys, 14 Gratt. (Va.) 478; Peart v. Cnicago, M. & St. P. R. Co. 8 S. Dak. 431, 66 N. W. 814.

court giving others on its own motion of a more general nature.[143]

In Texas the rule is that whenever a special instruction is requested the court should give or refuse it as requested; and it is an improper practice for the court to make any alteration of the instruction as requested, yet a qualification may be harmless.[144]

§ 32a. **Modifying in criminal cases.**—Instructions requested by the defendant in a criminal case may be modified by the court so as to make them show the theory of the prosecution, although such theory is presented in the instructions given for the prosecution.[145] And likewise where a requested instruction contains the caution to the jury that they should consider the danger of convicting an innocent person, it may be modified, directing them also to consider the danger to society in acquitting a guilty person.[146] And it is also proper to change an instruction so as to confine it to the evidence in the case.[147]

§ 33. **Changing to conform to issues.**—The court may modify an instruction to make it comprehensive enough to cover the issues and evidence.[148] An instruction charging the jury that the plaintiff is bound to prove every material allegation contained in his declaration by a preponderance of the evidence is properly modified by adding the words "or in some count thereof," where all the counts are good.[149]

An instruction, though proper under one branch of a case as alleged in one count of the declaration, may be modified to make it cover another element or branch alleged in another count. Instructions should not be so drawn as to ignore any issue raised by the pleadings.[150] So also where an instruction requested to be given for the defendant charges that if certain

[143] Jordan v. City of Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. 859; 36 L. R. A. 519; S. v. McCann, 16 Wash. 249, 49 Pac. 216.

[144] Trezevant v. Rains (Tex. Cv. App.), 25 S. W. 1092; Dillingham v. Fields, 9 Tex. Cv. App. 1, 29 S. W. 214.

[145] Smith v. S. 75 Miss. 542, 23 So. 260; Bingham v. Lipman, 40 Ore. 363, 67 Pac. 98.

[146] P. v. Stegenberg, 127 Cal. 510, 59 Pac. 942.

[147] Kimmel v. P. 92 Ill. 457, 460.

[148] Hays v. Border, 6 Ill. (1 Gilm.) 46, 65.

[149] Joliet R. Co. v. McPherson, 193 Ill. 629; St. Louis & S. W. R. Co. v. Ball, 28 Tex. Cv. App. 287, 66 S. W. 879.

[150] Pennsylvania Co. v. Marshall, 119 Ill. 399, 406, 10 N. E. 220.

enumerated facts are established by the evidence, then the defendant would be free from liability, the court may, on its own motion, modify the instruction by stating the converse of the proposition.[151]

An instruction which charges that: "If the jury believe from the evidence that the plaintiff in his application for insurance made a false or untrue statement as to the value or ownership of the property insured, as an inducement to the company to enter into the contract of insurance, and that the company relied upon such statement, and was induced thereby to enter into such contract of insurance, then such contract is voidable by its own terms and conditions, by the company, and it cannot be enforced against it, and the verdict should be for the company," is properly modified by adding: "Unless you further believe from the evidence that the defendant, after it had full knowledge of such representations, waived its right to a forfeiture of said policy on that ground." The right to a forfeiture and the waiver of that right are properly submitted in the one instruction.[152]

§ 34. Further instructions after jury retire.—The court may recall the jury after they have remained out some time and give them, at their request, further instructions where equal opportunity is given each party to submit such further instructions.[153] And it is not only the right, but it may be the duty of the court to further instruct the jury at their request.[154] Such further instructions must be reduced to writing if the original instructions were required to be in writing.[155]

[151] Missouri, K. & T. R. Co. v. Evans (Tex. Cv. App.), 41 S. W. 80.

[152] German Fire Ins. Co. v. Grunert, 112 Ill. 68, 77.

[153] Shaw v. Camp, 160 Ill. 430, 43 N. E. 608; Crowell v. P. 190 Ill. 514, 60 N. E. 872; City of Joliet v. Looney, 159 Ill. 471, 42 N. E. 854; Lee v. Quick, 20 Ill. 392; Farley v S. 57 Ind. 335; Guy v. S. 96 Md. 692; Wilkinson v. St. Louis S. D. Co. 102 Mo. 130; Richlands Iron Co. v. Elkins, 90 Va. 249, 17 S. E. 890; Hulse v. S. 35 Ohio St. 421; Sage v. Evansville & T. H. R. Co. 134 Ind. 100, 33 N. E. 771; Woodruff v. King, 47 Wis. 261, 2 N. W. 452. See generally: Cox v. Highley, 100 Pa. St. 252; Benavides v. S. 31 Tex. Cr. App. 173, 20 S. W. 369, 37 Am. St. 799; Nichols v. Munsel, 115 Mass. 567; National Lumber Co. v. Snell, 47 Ark. 407, 1 S.W. 708; City of Morris v. S. 25 Ala. 57; Breedlove v. Bunday, 96 Ind. 319; P. v. Mayes, 113 Cal. 618, 45 Pac. 860, 54 Am. St. 373; Hayes v. Williams, 17 Colo. 465, 30 Pac. 352.

[154] Dowzelot v. Rowlings, 58 Mo. 75; King v. S. 86 Ga. 355, 12 S. E. 943.

[155] Bowden v. Archor, 95 Ga. 243, 22 S. E. 254; P. v. Charles, 26 Cal. 78; S. v. Harding, 81 Iowa, 599, 47 N. W. 877; P. v. Wappner, 14 Cal. 437; Columbia V. & B. Co. v. Cottonwood L. Co. 99 Tenn. 122,

§ 35. **Further instructions in absence of counsel.**—But the court cannot send to the jury material additional instructions after they have retired, in the absence or without the knowledge or consent of counsel of the respective parties, though such additional instructions be requested by the jury.[156] The mere giving of further instructions, however, in the absence of counsel is not of itself error if given in open court.[157] In such case the court is not bound to send for the parties or their counsel, whose duty it is to remain in court until the jury return a verdict.[158] If it appears that no injury was done to the complaining party, the error in thus instructing is harmless.[159] It is not error to thus give further instructions when counsel are present and make no objection, if the additional instructions correctly state the law.[160]

§ 36. **Further instructions in absence of defendant.**—The mere giving of further instructions in any criminal case in the absence of the defendant is error, unless in case the defendant has absconded, or in some manner waived his right to be present.[161] And it is error to further instruct, in the absence of the defendant, although the court may merely re-read the in-

41 S. W. 351; Willis v. S. 89 Ga. 188, 15 S. E. 32.

[156] Chicago & A. R. Co. v. Robbins, 159 Ill. 602, 43 N. E. 332; Com. v. Howe (Pa. Super. Ct.), 4 W. N. Cas. 246; Felker v. Douglass, (Tex. Cv. App.), 57 S. W. 323; Seagrave v. Hall, 3 Ohio Cir. Dec. 221. See City of Joliet v. Looney, 159 Ill. 471, 42 N. E. 854; Kehrley v. Shafer, 36 N. Y. S. 510, 92 Hun, N. Y. 196; Fisher v. P. 23 Ill. 218. Contra: S. v. Dudousot, 47 La. Ann. 977, 17 So. 685. See also Seagrave v. Hall, 10 Ohio C. C. 395 (no attempt made to notify parties or counsel); Sargent v. Roberts, 1 Pick. (Mass.), 337, 11 Am. Dec. 185; S. v. Davenport, 33 La. Ann. 231; Parkinson v. Concord St. R. Co. 71 N. H. 28, 51 Atl. 268; S. v. Paterson, 45 Vt. 301, 1 Green Cr. R. 492; Kuhl v. Long, 102 Ala. 569, 15 So. 267, (no effort was made to have counsel present); Low v. Freeman, 117 Ind. 345, 20 N. E. 242; Campbell v. Beckett, 8 Ohio St. 211; Preston v. Bowers, 13 Ohio St. 14, 82 Am. Dec. 430 (not error if counsel have been called); Feibelman v. Manchester F. A. Co. 108 Ala. 180, 19 So. 540.

[157] Aerheart v. St. Louis, I. M. & S. R. Co. 90 Fed 907; Wade v. Ordway, 1 Baxt. (Tenn.) 229.

[158] Cooper v. Morris, 48 N. J. L. 607, 7 Atl. 427; Cornish v. Graff, 36 Hun (N. Y.) 160.

[159] Moseley v. Washburn, 165 Mass. 417, 43 N. E. 182; Felker v. Douglass, (Tex. Cv. App.) 57 S. W. 323; Glenn v. Hunt, 120 Mo. 330, 25 S. W. 181; Galloway v. Corbitt, 52 Mich. 461, 18 N. W. 218.

[160] Wilson v. S. 37 Tex. Cr. App. 156, 38 S. W. 1013; Barnett v. Salomon, 118 Mich. 460, 76 N. W. 1035; see McMahon v. Eau Claire W. Works, 95 Wis. 640, 70 N. W. 829.

[161] Maurer v. P. 43 N. Y. 1; Bonner v. S. 67 Ga. 510; Benavides v. S. 31 Tex. Cr. App. 173, 20 S. W. 369, 3 Am. St. 799; Jones v. S. 26 Ohio St. 208; Hulse v. S. 35 Ohio St. 429 (defendant absconding); Rafferty v. P. 72 Ill. 46.

structions exactly as given.[162] But in several states the courts hold that if the defendant, in criminal cases, is present it is not improper to give such additional instructions, although his counsel may not be present.[163]

§ 37. Instructing further on other points.—In the absence of a statute to the contrary it is not error in further charging the jury to instruct on other points in addition to those on which the jury requested information, providing the instructions are otherwise correct.[164] But in Texas such practice is prohibited by statue.[165] But the court cannot go to the extent of giving substantially a new and complete charge on the issues.[166] Nor is it a wise practice to repeat the entire charge as originally given, when the jury ask for further instructions, for fear of confusion.[167] But if the jury say they do not understand the instructions, they may be re-read if the parties are present.[168] On the other hand, to repeat only a portion of the charge may be error, especially if no request has been made by the jury for further instructions.[169]

§ 38. Recalling jury for further instructions.—The court, in its discretion, in furtherance of justice, may recall the jury and give additional instructions, and the action of the court in this respect will not be the subject of review unless it appears that such discretion was abused.[170] And it has been held that the court may, on its own motion, recall the jury after they have been deliberating, for the purpose of aiding them when they were involved in any difficulty in reaching a verdict.[171]

So for the court to say to the jury in asking them to deliberate

[162] Kinnemer v. S. 66 Ark. 206, 49 S. W. 815.

[163] P. v. Mayes, 113 Cal. 618, 45 Pac. 860, 54 Am. St. 373; S. v. Miller, 100 Mo. 606, 13 S. W. 832, 1051; Jones v. S. 26 Ohio St. 208; Bonner v. S. 67 Ga. 510; Hulse v. S. 35 Ohio St. 429; Johnson v. S. 100 Ala. 55, 14 So. 627.

[164] P. v. M'Kay, 122 Cal. 628, 55 Pac. 594; Harper v. S. 109 Ala. 66, 19 So. 901; Chouteau v. Jupiter Iron Works, 94 Mo. 388, 7 S. W. 467.

[165] Hannahan v. S. 7 Tex. Cr. App. 610; Chamberlain v. S. 2 Tex. App. 451.

[166] Foster v. Turner, 31 Kas. 65, 1 Pac. 145.

[167] Gravett v. S. 74 Ga. 196; Wilson v. S. 68 Ga. 827.

[168] Woodruff v. King, 47 Wis. 261, 2 N. W. 452; Goff v. Greer, 88 Ind. 122, 45 Am. R. 449.

[169] Granberry v. Frierson, 2 Baxt. (Tenn.) 326; Cockrill v. Hall, 76 Cal. 193, 18 Pac. 318. See Lloyd v. Moore, 38 Ohio St. 100.

[170] McClary v. Stull, 44 Neb. 191, 61 N. W. 501. See Young v. Hahn, (Tex. Cv. App.), 69 S. W. 203.

[171] Allis v. U. S. 155 U. S. 117, 39 Sup. Ct. 91.

further (after they had been considering the case for two days), "I feel that no twelve men can be found better qualified than you to decide this case," is not error.[172] Also the jury may be recalled by the court for the purpose of correcting errors in the giving of instructions.[173] It has been held in one jurisdiction that the court may, in its discretion, recall the jury and amplify or enlarge on the instructions, though not requested to do so.[174] The court may, in its discretion, refuse to recall the jury after they have retired, for further instructions at the request of a party.[175]

§ 39. **Judge calling on jury—Effect.**—The court has no authority to call on the jury in the jury room and confer with them about the case without the consent of the parties, and to do so is error;[176] and when the judge does so call on the jury it must appear that the consent of both sides was expressly given.[177] The mere presence of the judge of the court in the jury room, watching the deliberations of the jury, is error, whether he may have said anything or not.[178]

§ 40. **Withdrawing erroneous instructions—Amending.**—Where erroneous instructions have been given the court may withdraw them from the consideration of the jury at any time before a verdict has been reached,[179] especially if they are with-

[172] Shely v. Shely, 20 Ky. L. R. 1021, 47 S. W. 1071; McDaniel v. Crosby, 19 Ark. 533. See, also, Solomon v. Reis, 5 Ohio C. C. 375; Hannon v. S. 70 Wis. 448, 36 N. W. 1; S. v. Rollins, 77 Me. 380, 52 Am. R. 779; S. v. Pitts, 11 Iowa, 343; S. v. Chandler, 31 Kas. 201, 1 Pac. 787.

[173] S. v. Lightsey, 43 S. Car. 114, 20 S. E. 975; Florence Sewing M. Co. v. Grover & B. Sewing M. Co. 110 Mass. 70, 14 Am. R. 579.

[174] Jones v. Swearingen, 42 S. Car. 58, 19 S. E. 947.

[175] Young v. Hahn (Tex. Cv. App), 69 S. W. 203.

[176] Lester v. Hays (Tex. Cv. App.), 38 S. W. 52; Jones v. Johnson, 61 Ind. 257; Quinn v. S. 130 Ind. 340, 30 N. E. 300. See, also, generally, Goode v. Campbell, 14 Bush. (Ky.) 75; Johnson v. S. 100 Ala. 55, 14 So. 629; S. v. Wroth, 15 Wash. 621, 47 Pac. 106; Hopkins v. Bishop, 91 Mich. 328, 51 N. W. 902, 30 Am. St. 480; S. v. Alexander, 66 Mo. 148; Reed v. City of Cambridge, 124 Mass. 567, 26 Am. R. 690; Sommer v. Huber, 183 Pa. St. 162, 38 Atl. 595; Kirk v. S. 14 Ohio St. 511; Snyder v. Wilson, 65 Mich. 336, 32 N. W. 642; Hoberg v. S. 3 Minn. 262; Gibbons v. Van Alstyne, 29 N. Y. S. 463.

[177] Smith v. McMillen, 19 Ind. 391; Bunn v. Crowl, 10 Johns. (N. Y.) 239.

[178] Gibbons v. Van Alstyne, 29 N. Y. S. 461; S. v. Wroth, 15 Wash. 621, 47 Pac. 106.

[179] Resmer v. Thornbury, 111 Iowa, 515, 82 N. W. 950; Sittig v. Birkestack, 38 Md. 158; Sommer v. Gilmore, 168 Pa. St. 117, 31 Atl. 884; Sage v. Evansville & T. H. R. Co. 134 Ind. 100, 33 N. E. 771; P. v. Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. S. 188; Shackelford v. S. (Tex. Cr. App.), 53 S. W. 884; Reed v. S. (Neb.), 92 N

drawn in such manner as to be clearly understood by the jury.[180] And where the parties, by agreement, submit a cause to be tried by the court without a jury, any legal proposition submitted as the law of the case may be withdrawn before the court has passed upon the same.[181] Instructions may be amended during the arguments where counsel are not thereby deprived of the right to discuss the effect of such amendments.[182]

§ 41. Rulings and remarks not instructions.—Remarks made by the court during the introduction of the evidence, stating for what particular purpose certain evidence is admitted, that the jury may understand its proper application to the issues, are not instructions within the meaning of the statute requiring instructions to be in writing.[183] Rulings of the court in passing upon a motion to exclude from the jury certain testimony do not come within the rule of written instructions.[184] It is not error for the court to give the jury oral directions on matters which do not relate to the merits of the case.[185] An oral statement by the court that, "you must not arrive at your verdict by lot or chance, but only by considering the evidence," was held not to be prejudicial error.[186] A direction to the jury to return a verdict in favor of a party is not an instruction within the meaning of a statute requiring instructions to be given in writing.[187]

W. 321; Bonner v. S. 107 Ala. 97, 18 So. 226; Chicago & E. I. R. Co. v. Zapp, 209 Ill. 341 (withdrawn orally after reading to the jury).

[180] S. v. Wells, 54 Kas. 161, 37 Pac. 1005; Lower v. Franks, 115 Ind. 334, 17 N. E. 630; Wenning v. Teeple, 144 Ind. 189, 41 N. E. 600.

[181] Smith v. Mayfield, 163 Ill. 447, 45 N. E. 157.

[182] Powers v. Com. 22 Ky. L. R. 1807, 61 S. W. 735.

[183] Farmer v. Thrift, 94 Iowa, 374, 62 N. W. 804; Stanley v. Sutherland, 54 Ind. 339; Bradway v. Waddell, 95 Ind. 170; Madden v. State, 148 Ind. 183, 47 N. E. 220; Hatfield v. Chenoworth, 24 Ind. App. 343, 56 N. E. 51; S. v. Good, 132 Mo. 114, 33 S. W. 795.

[184] Bloomer v. Sherrill, 11 Ill. 483, 485.

[185] White, Kingsland Mfg. Co. v. Herdrich, 98 Ill. App. 607; Dodd v. Moore, 91 Ind. 522; Pate v. Wight, 30 Ind. 476, 95 Am. Dec. 705; Sample v. S. 104 Ind. 289, 4 N. E. 40 (oral statement that counsel have requested written instructions not error); Sargent v. S. 35 Tex. Cr. App. 325, 33 S. W. 364; Hasbrouck v. City of Milwaukee, 21 Wis. 219; Lehman v. Hawks, 121 Ind. 543, 23 N. E. 670; McCallister v. Mount, 73 Ind. 566; Bradway v. Waddell, 95 Ind. 170; Clouser v. Ruckman, 104 Ind. 588, 4 N. E. 202, (reading the pleadings to the jury has been held not to be error); Moore v. City of Platterville, 78 Wis. 644, 47 N. W. 1055.

[186] Lankster v. S. (Tex. Cr. App.), 72 S. W. 388.

[187] Liggett & M. T. Co. v. Collier, 89 Iowa, 144, 56 N. W. 417.

§ 42. Directions as to form of verdict.—The form of the verdict which calls for the statement of any legal proposition is included under a statute requiring instructions to be in writing.[188] But to instruct the jury orally as to the form of the verdict is not a violation of the statute, unless some rule or principle of law applicable to the case should be given in directing the jury as to the form of the verdict.[189] If the defendant in a criminal case desires that a form of verdict should be given as to a lesser or included offense, he should prepare and request such form.[190] The giving of a form of verdict for a conviction without submitting a form for acquittal is not error in the absence of a request for such form.[191]

§ 43. Signing and numbering instructions.—In some of the states, requested instructions must be signed by counsel, otherwise it is not error to refuse them;[192] and in other states they must be signed by the judge of the court, as well as by counsel.[193] But the giving of instructions which are not signed by counsel as required by statute is not error where the court signs them.[194] It has been held that a statute requiring instructions to be signed by the judge of the court is only directory, and that if they are not so signed the error is immaterial.[195] The failure of the

[188] Ellis v. P. 159 Ill. 337, 339, 42 N. E. 873; Helm v. P. 186 Ill. 153, 57 N. E. 886.

[189] Illinois Cent. R. Co. v. Wheeler, 149 Ill. 525, 36 N. E. 1023; Helm v. P. 186 Ill. 153; Ellis v. P. 159 Ill. 337, 42 N. E. 873, 57 N. E. 886; Carlyle Canning Co. v. Baltimore & O. S. W. R. Co. 77 Ill. App. 396; Smith v. P. 142 Ill. 124, 31 N. E. 599; Illinois Cent. R. Co. v. Hammer, 85 Ill. 526.

[190] Dunn v. P. 109 Ill. 646; Dacey v. P. 116 Ill. 575, 6 N. E. 165; Hughes Cr. Law, § 3240.

[191] Green v. S. 40 Fla. 474, 24 So. 537.

The court may read the forms of verdict to the jury. P. v. Chaves, 122 Cal. 134, 54 Pac. 596.

[192] State Nat. Bank v. Bennett, 8 Ind. App. 679, 36 N. E. 551; Texas & P. R. Co. v. Mitchell (Tex. Cv. App.), 26 S. W. 154; Mason v. Sieglitz, 22 Colo. 320, 44 Pac. 588; Buchart v. Ell. 9 Ind. App. 353, 36 N. E. 762; Board v. Legg, 110 Ind. 474, 11 N. E. 612; Hutchinson v. Lemcke, 107 Ind. 121, 8 N. E. 71; Chicago & E. I. R. Co. v. Hedges, 105 Ind. 398, 7 N. E. 801; Citizens St. R. Co. v. Hobbs, 15 Ind. App. 610, 43 N. E. 479; Craig v. Frazier, 127 Ind. 286, 26 N. E. 842; Farrer v. McNair, 65 Kas. 147, 69 Pac. 167.

[193] Galveston, H. & S. A. R. Co. v. Neel (Tex. Cv. App.), 26 S. W. 788; Denmark v. S. 43 Fla. 182, 31 So. 269 (signature under seal not required).

[194] Galveston, H. & S. A. R. Co. v. Neel (Tex. Cv. App.), 26 S. W. 788.

[195] Halley v. Tichenor, 120 Iowa, 164, 94 N. W. 472; S. v. Stanley, 48 Iowa, 221; Dillingham v. Bryant (Tex. App.), 14 S. W. 1017; Parker v. Chancellor, 78 Tex. 524, 15 S. W. 157. Contra: Baker v. S. 17 Fla. 410; Tyree v. Parham,

court to number the instructions or paragraphs is not ground for reversal, although by statute the court is required to number and sign them.[196]

§ 44. Marking "given," "refused," effect.—Under a statute requiring instructions which are given, to be marked on the margin "given," and those which are refused to be marked "refused," it is not material error if they are not so marked.[197] A statute requiring instructions to be thus marked is only directory, and not mandatory.[198] Hence, the giving of an instruction, though not marked as required, is not material error,[199] especially if no objection was made to the giving of it without thus marking it.[200] So when it is difficult to determine whether an instruction which was given was marked "given" or "refused," there is no ground for complaint.[201]

It follows from what has been said that an instruction which is neither marked "given" nor "refused," and not read to the jury will be regarded as refused.[202] In some jurisdictions where instructions are given by the court on its own motion they are not required to be marked "given."[203] But where a correct instruction which was proper to be given was marked "refused," but read to the jury and given with others marked "given," it was held to be error in the absence of any other

66 Ala. 424; Smith v. S. 1 Tex. App. 416 (as to felony); Carter v. S. 22 Fla. 553 (the manner of signing held sufficient).

196 Shields v. S. 149 Ind. 412, 48 N. E. 346; Coryell v. Stone, 62 Ind. 312; S. v. Booth (Iowa), 88 N. W. 344; Miller v. Preston, 4 N. Mex. (Johns.) 314, 17 Pac. 565. See Weightnovel v. S. (Fla.), 35 So. 862.

197 McDonald v. Fairbanks, Morse & Co. 161 Ill. 124, 131, 43 N. E. 783; McKinzie v. Remington, 79 Ill. 388, 390; Cook v. Hunt, 24 Ill. 536, 551. See Kepperly v. Ramsden, 83 Ill. 354, 359; Bressemer Sav. Bank v. Anderson, 134 Ala. 343, 32 So. 716, 92 Am. St. 38; Barnewall v. Murrell, 108 Ala. 366, 18 So. 831; Goodwin v. S. (Ala.), 18 So. 694; Moore v. Sweeney, 28 Ill. App. 547 (writing on an instruction the reason for refusing is a compliance with the statute).

198 Turley v. Griffin, 106 Iowa, 161, 76 N. W. 660; Daxanbeklav v. P. 93 Ill. App. 553.

199 Tobin v. S. 101 Ill. 121; McClellan v. Hein, 56 Neb. 600, 77 N. W. 120.

200 Jolly v. S. 43 Neb. 857, 62 N. W. 300; City of Chadron v. Glover, 43 Neb. 732, 62 N. W. 62.

201 Washington v. S. 106 Ala. 58, 17 So. 546.

202 Duffin v. P. 107 Ill. 113, 122, 47 Am. R. 431; Calef v. Thomas, 81 Ill. 486. See Flower v. Beveridge, 161 Ill. 53, 43 N. E. 722; Little v. S. 58 Ala. 265; Tobin v. P. 101 Ill. 123; S. v. Hellekson, 13 S. Dak. 242, 83 N. W. 254.

203 Ter. v. Cordova (N. Mex.), 68 Pac. 919; P. v. Samsels, 66 Cal. 99, 4 Pac. 1061; Gillen v. Riley, 27 Neb. 158, 42 N. W. 1054. See Harvey v. Tama Co. 53 Iowa. 228, 5 N. W. 130 ("instructions one to seven all refused." is sufficient). Lawrenceville Cement Co. v. Park,

instructions on the same point in a case where the facts were closely contested.[204]

§ 45. Marking for plaintiff—Underscoring.—The charge should be given to the jury as the instructions of the court without anything appearing on them, showing at whose instance they were given. The instructions should not be marked or indicated as "for the plaintiff" or "for the defendant."[205] But to give instructions thus marked is not reversible error.[206] Submitting to the jury instructions with the authorities noted on them, showing the volume and page of the book in which the law may be found, will not be presumed to be prejudicial error, although such practice is improper.[207]

Underscoring words in instructions given is improper as it gives them undue weight.[208] But it has been held not to be error to underscore words of an instruction where such words are usually italicised in legal treatises.[209] The giving of such an instruction, however, cannot be urged as error unless it appears to have been prejudicial.[210] The giving of instructions in which display type are used is harmless error, where they are used only in ordinary and general instructions on questions not involving specific facts; though such practice is improper.[211]

60 Hun (N. Y.) 586; Ter. v. Baker, 4 N. Mex. 236, 13 Pac. 30 (marking on the last page that the foregoing are all refused is sufficient).

[204] Terre Haute & I. R. Co. v. Hybarger, 67 Ill. App. 480. The court is not authorized to mark instructions after the verdict, Bacon v. Bacon, 76 Miss. 458, 24 So. 968. Only such instructions as the court holds to be the law need be read to the jury: Com. v. Clark, 3 Pa. Super. 141; Baltimore & O. R. Co. v. Friel, 77 Fed. 126; Long v. Southern R. Co. 50 S. Car. 49, 27 S. E. 531; Stewart v. Mills, 18 Fla. 57.

[205] Aneals v. P. 134 Ill. 401, 416, 25 N. E. 1022; Stevenson v. Chicago & N. W. R. Co. 94 Iowa, 719, 61 N. W. 964; Wilson v. White, 71 Ga. 507, 51 Am. R. 269; S. v. Cotrill, 52 W. Va. 363, 43 S. E. 244, 59 L. R. A. 513. See Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 744. See also Barkman v. S. 13 Ark. 706; Anderson v. City of Bath, 42 Me. 346.

[206] Sample v. S. 104 Ind. 289, 4 N. E. 40.

[207] Herzog v. Campbell, 47 Neb. 370, 66 N. W. 424; In re Goldthorp Estate, 115 Iowa, 430, 88 N. W. 944; Wright v. Brosseau, 73 Ill. 381; City of South Omaha v. Fennell (Neb.), 94 N. W. 632; Williams v. St. Louis & S. F. R. Co. 123 Mo. 573, 27 S. W. 387 (held not error unless the jury had the books or knew what was decided in the cases cited). See Wragge v. S. Car. & G. R. Co. (S. Car.), 25 S. E. 76 (rule of court requiring the authorities to be noted on the margin of instruction).

[208] S. v. Cater, 100 Iowa, 501, 69 N. W. 880; McCormick H. M. Co. v. Sendzikowski, 72 Ill. App. 402.

[209] Philpot v. Lucas, 101 Iowa, 478, 70 N. W. 625.

[210] Wright v. Brosseau, 73 Ill. 381.

[211] Hagenow v. P. 188 Ill. 553, 59 N. E. 242; Featherstone v. P. 194 Ill. 325, 62 N. E. 684; Wright v. Brosseau, 73 Ill. 387.

§ 46. Court's manner of charging the jury.—The manner in which the court charges the jury—his tone of voice or peculiar methods of emphasis or the like—cannot be urged as error. The reviewing courts are powerless to afford relief for such grievances.[212]

§ 47. Trial by court, jury waived.—In cases tried by the court without a jury, if a party desires to preserve the rulings of the court as to the law of the case, he should, as required by statute, prepare and submit formal propositions to be held or refused, and take exceptions to the rulings if adverse to him and preserve the propositions and rulings thereon in a bill of exceptions.[213] In Indiana, in order to preserve the holding of the court as to the law, the court is required by statute, at the request of either party, to make a special finding of the facts and conclusions of law thereon, in writing, and to which conclusions of law exceptions must be properly taken.[214] In the trial of a case without a jury, where the decision depends entirely upon the view the court may take of the evidence, whether the evidence of the one or the other party is most reliable when conflicting, no difference what view the court may take of the abstract propositions of law, it will be immaterial.[215] The rulings of the court in rejecting propositions requested, where the case is tried by the court without a jury, cannot be urged as error if the propositions actually held to be the law applicable state every principle of law necessary to be considered in the decision of the case.[216]

[212] Horton v. Chevington & B. C. Co 2 Penny. (Pa.) 1; Gibbs v. Johnson, 63 Mich. 674, 30 N. W. 343; Rountree v. Gurr, 68 Ga. 292; Bishop v. Journal Newspaper Co. 168 Mass. 327, 47 N. E. 119; S. v. Howell, 28 S. Car. 250, 5 S. E. 617.

[213] Hobbs v. Ferguson, 100 Ill. 232; Merrimac Paper Co. v. Illinois Trust & S. Bank, 129 Ill. 296, 21 N. E. 787; Montgomery v. Black, 124 Ill. 62, 15 N. E. 28; Christy v. Stafford, 123 Ill. 466, 14 N. E. 680; McIntyre v. Sholtey, 121 Ill. 665, 13 N. E. 239, 2 Am. St. 140; Kelderhouse v. Hall, 116 Ill. 150, 4 N. E. 652; Wrought Iron B. Co. v. Commissioners, 101 Ill. 522.

[214] Hartlep v. Cole, 120 Ind. 247, 22 N. E. 130; Winstandley, v. Breyfogle, 148 Ind. 618, 48 N. E. 224; Nelson v. Cottingham, 152 Ind. 135, 52 N. E. 702; Hoover v. S. 110 Ind. 349, 11 N. E. 434; Stumph v. Miller, 142 Ind. 446, 41 N. E. 812; McCray v. Humes, 116 Ind. 111, 18 N. E. 500; Branch v. Faust, 115 Ind. 464, 17 N. E. 898.

[215] Stowell v. Moore, 89 Ill. 563, 31 Am. R. 105.

[216] Germania Fire Ins. Co. v. Hicks, 125 Ill. 364, 17 N. E. 792, 8 Am St. 384.

CHAPTER II.

QUALITIES AND REQUISITES.

Sec.
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§ 48. **Abstract propositions of law.**—Instructions should be so framed as to inform the jury what the law is, as applicable to the facts in evidence, and not in general terms in the form of

abstract propositions of law.[1] Such instructions, although abstractly correct, are likely to be misleading, and for that reason should not be given.[2]

An instruction, though correctly stating an abstract proposition of law, may be refused if there is no evidence upon which to base it, or if it in no wise has any application to the facts of a case.[3] But the giving of instructions which merely announce

[1] Morris v. Platt, 32 Conn. 75. See Hassett v. Johnson, 48 Ill. 68, 95 Am. Dec. 519; Seekel v. Norman, 71 Iowa, 264, 32 N. W. 334; Baldwin v. S. 75 Ga. 489; S. v. Jones, 87 N. Car. 542; Pittsburg Coal Co. v. Estievenard, 53 Ohio St. 43, 40 N. E. 725; Parmlee v. Adolph, 20 Ohio St. 10; Fisher v. Central Lead Co. 156 Mo. 479, 56 S. W. 1107; P. v. Hartman, 130 Cal. 487, 62 Pac. 823; Smiley v. Scott, 179 Ill. 142, 53 N. E. 544; Thomas v. S. 126 Ala. 4, 28 So. 591; P. v. Considine, 105 Mich. 149, 63 N. W. 196.

[2] Caughlin v. P. 18 Ill. 266, 68 Am. Dec. 541; Collins v. City of Janesville, 107 Wis. 436, 83 N. W. 695, 51 L. R. A. 917; Smith v. Bank (N. H.), 54 Atl. 385; S. v. Prater, 52 W. Va. 132, 43 S. E. 230; Cobb v. Simon (Wis.) 97 N. W. 279.

[3] Martinez v. S. (Tex. Cr. App.), 57 S. W. 670; S. v. Goff, 62 Kas. 104, 61 Pac. 683; Jesse v. State (Tex. Cr. App.), 57 S. W. 826; Kassman v. City of St. Louis, 153 Mo. 293, 54 S. W. 513; Sparks v. S. 111 Ga. 380, 35 S. E. 654; Chambers v. P. 105 Ill. 409, 416; Whelan v. Kinsley, 26 Ohio St. 137; Lewis v. S. 4 Ohio, 389; Davis v. S. 25 Ohio St. 373; Lexington Ins. Co. v. Paver, 16 Ohio 324; City of Aledo v. Honeyman, 208 Ill. 415; Spence v. Huckins, 208 Ill. 309; Rankin v. Sharples, 206 Ill. 309; Germania Fire Ins. Co. v. McKee, 94 Ill. 494, 500; Crane Co. v. Tierney, 175 Ill. 79, 82, 51 N. E. 715; Atkinson v. Lester, 2 Ill. (1 Scam.) 409; Gray v. Sharpe (Colo. App.), 67 Pac. 375 (held error to give abstract instructions if there is no evidence on which to base them); Hurlbut v. Hall, 39 Neb. 889, 58 N. W. 538; Omaha Nat. Bank v. Thompson, 39 Neb. 269, 57 N. W. 997; Wadsworth v. Williams, 101 Ala. 264, 13 So. 755; S. v. Hicks, 130 N. Car. 705, 41 S. E. 803; Union E. R. Co. v. Nixon, 199 Ill. 235, 65 N. E. 314; Oliver v. Sterling, 20 Ohio St. 399; S. v. Tibbs, 48 La. Ann. 1278, 20 So. 735; Farmers' Banking Co. v. Key, 112 Ga. 301, 37 S. E. 447; Smith v. Bank, &c. 70 N. H. 187, 46 Atl. 230; Long v. Hunter, 58 S. Car. 152, 36 S. E. 579, 79 Am. St. 836; Collins v. City of Janesville, 107 Wis. 436, 83 N. W. 695, 51 L. R. A. 917; Lear v. McMillen, 17 Ohio St. 464; Castlin v. S. (Tex. Cr. App.), 57 S. W. 827; Kirk v. Ter. 10 Okla. 46, 60 Pac. 797; Wallace v. S. 41 Fla. 547, 26 So. 713; Mansfield v. Neese, 21 Tex. Cv. App. 584, 54 S. W. 370; Thomas v. Gates, 126 Cal. 1, 58 Pac. 315; City of Marshall v. McAlister, 22 Tex. Cv. App. 214, 54 S. W. 1068; Safford v. S. 76 Miss. 258, 26 So. 945; Matula v. Lane, 22 Tex. Civ. App. 391, 55 S. W. 502; Chicago West Division R. Co. v. Ingraham, 131 Ill. 659, 667, 23 N. E. 350; Belk v. P. 125 Ill. 584, 591, 17 N. E. 744; Smiley v. Scott, 179 Ill. 142, 53 N. E. 544; Montag v. P. 141 Ill. 75, 81, 30 N. E. 337; City of Joliet v. Johnson, 177 Ill. 178, 184, 52 N. E. 498, 69 Am. St. 216; Alton Paving, &c. Co. v. Hudson, 176 Ill. 270, 275, 52 N. E. 256; Scanlon v. Warren, 169 Ill. 142, 48 N. E. 410; Pennsylvania Co. v. Marshall, 119 Ill. 399, 406, 10 N. E. 220; Bressler v. P. 117 Ill. 422, 442, 8 N. E. 62; City of Lynchburg v. Wallace, 95 Va. 640, 29 S. E. 675; Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295; Davis v. S. 25 Ohio St. 373; Whalen v. Kinsley, 26 Ohio St. 137; Gray v. Callender, 181 Ill. 173, 54 N. E. 910; Byers v. Maxwell, 22 Tex. Cv. App. 269, 54 S. W. 789;

abstract principles of law cannot be urged as material error unless they are prejudicial or misleading.[4]

If an irrelevant instruction be given, although unobjectionable as an abstract proposition of law, which is calculated to mislead the jury and affect their conclusion upon the issue submitted to them it is error.[5] And where the instructions taken as a whole

Oftelie v. Town of Hammond, 78 Minn. 275, 80 N. W. 1123; Hart v. Bowen, 80 Fed. 877; Heinman v. Kinnare, 73 Ill. App. 184; Campbell v. P. 109 Ill. 565, 577, 50 Am. R. 621; Upstone v. P. 109 Ill. 169, 176; Johnson v. Hirschburg, 85 Ill. App. 47; Hyde & Leather National Bank v. Alexander, 184 Ill. 416, 56 N. E. 809; Louisville, New Albany & Chicago R. Co. v. Patchen, 167 Ill. 204, 211, 47 N. E. 368; Long v. Hunter, 58 S. Car. 152, 36 S. E. 579, 79 Am. St. 836; Sullivan v. S. 117 Ala. 214, 23 So. 678; Bondurant v. S. 125 Ala. 31, 27 So. 775; Troy v. Rogers, 113 Ala. 131, 20 So. 999; Tischler v. Kurtz, 35 Fla. 323, 17 So. 661; Oliver v. Sterling, 20 Ohio St. 391; Stryker v. Goodnow, 123 U. S. 527, 8 Sup. Ct. 203; Coffin v. United States, 162 U. S. 664, 16 Sup. Ct. 943; Allen v. Hamilton, 109 Ala. 634; 19 So. 906; Mayer v. Wilkins, 37 Fla. 244, 19 So. 632; Reilly v. Third Ave. R. Co. 35 N. Y. S. 1030 14 Misc. 445; Chapman v. Southern Pac. R. Co. 12 Utah, 30, 41 Pac. 551.

[4] Chicago & A. R. Co. v. City of Pontiac, 169 Ill. 172, 48 N. E. 485; Pate v. P. 8 Ill. (3 Gilm.) 661; Betting v. Hobbett, 142 Ill. 72, 30 N. E. 1048; Town of Wheaton v. Hadley, 131 Ill. 644, 23 N. E. 422; Herbich v. North Jersey St. R. Co. 67 N. J. L. 574, 52 Atl. 357; Doyle v. S. 39 Fla. 155, 22 So. 272, 63 Am. St. 159; Payne v. Crawford, 102 Ala. 387, 14 So. 854; Cooke v. Cook, 100 Ala. 175, 14 So. 171, 46 Am. St. 33; Denver Tr. Co. v. Owens, 20 Colo. 107, 36 Pac. 848, (such instruction is harmless if it states the law correctly); Meiners v. City of St. Louis, 130 Mo. 274, 32 S. W. 637; Bosqui v. Sutro R. Co. 131 Cal. 390, 63 Pac. 682, 82 Am. St. 355; Johnson v. McKee, 27 Mich. 471 (instruction complained of favorable); Moore v. People, 190 Ill. 331, 338, 60 N. E. 535; Greene v. Greene, 145 Ill. 271, 33 N. E. 941; Hurst v. McMullen (Tex. Cv. App.), 48 S. W. 744; Doolittle v. Southern R. Co. 62 S. Car. 130, 40 S. E. 133; Chicago City R. Co. v. Anderson, 193 Ill. 9, 14, 61 N. E. 999; Chicago, B. & Q. R. Co. v. Dickson, 143 Ill. 374, 32 N. E. 380; Grier v. Puterbaugh, 108 Ill. 602, 607; Denton v. Jackson, 106 Ill. 433, 438; Corbin v. Shearer, 8 Ill. (3 Gilm.) 482; Bandalow v. P. 90 Ill. 218; Needham v. P. 98 Ill. 280; Healey v. P. 163 Ill. 383, 45 N. E. 230; Cook v. P. 177 Ill. 146, 52 N. E. 273. See Underhill Cr. Ev. § 278. S. v. Rose, 142 Mo. 418, 44 S. W. 329; Salomon v. Cress, 22 Ore. 177, 29 Pac. 439, 15 L. R. A. 614; Canon v. Farmers' Bank (Neb.) 91 N. W. 585; Reed v. Commonwealth, 98 Va. 817, 36 S. E. 399; Hough v. Grant's Pass Power Co. 41 Ore. 531, 69 Pac. 655; Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; Caw v. P. 3 Neb. 357; Schneider v. Hosier, 21 Ohio St. 113; Bank of C. v. Eureka B. & L. Co. 108 Ala. 89, 18 So. 600; Ward v. Henry, 19 Wis. 76, 88 Am. Dec. 672; Jones v. Williams, 108 Ala. 282, 19 So. 317; Benjamin v. Metropolitan St. R. Co. 133 Mo. 274, 34 S. W. 590; State v. Canty, 41 La. Ann. 587 6 So. 338; McCutchen v. Loggins, 109 Ala. 457, 19 So. 810; P. v. March, 6 Cal. 543; Pittsburg, Ft. W. & C. R. Co. v. Slusser, 19 Ohio St. 157; Beidler v. King, 209 Ill. 302, 312.

[5] Caughlin v. P. 18 Ill. 266, 68 Am. Dec. 541; Trustees v. McCormick & Bros. 41 Ill. 323; McNair v. Platt, 46 Ill. 211, 214. See Healy v. P. 163 Ill. 383, 45 N. E. 230; Welter v. Leistikow, N. Dak. 283, 83 N. W. 9; Smith v. Bank (N. H.) 54 Atl. 385; State v. Prater, 52 W. Va. 132, 43 S. E. 230, 241; Meyer v. Reimer, 65

are mere abstract propositions of law, having no application to the facts in issue, they are, in fact, misleading.[6] It is error to give such an instruction if it leaves the jury in doubt as to what application it has to the evidence.[7] But a charge consisting of general abstract propositions given for the purpose of illustrating the rules governing the facts in issue is not erroneous.[8] The court, in charging the jury, may use illustrations by stating a hypothetical case without reference to the evidence. But such illustrations should be used with great caution and should guard against the intimation of an opinion by the court on the facts.[9]

§ 49. **Cautionary instructions—Generally**—The giving of cautionary instructions is necessarily a matter very much within the discretion of the court. The judge is in a position to observe and know whether the situation is such as to require such instructions, and a refusal to give them cannot ordinarily be assigned as error.[10] And in giving cautionary instructions to the jury as to their duties the court is not bound to instruct in the precise form requested.[11]

It is proper for the court in charging the jury to caution them to be governed by the law and the evidence, and not be influenced by any falacious views or notions of counsel in his argument where any such false position may have been taken by counsel.[12] Thus, for instance, where counsel for the defendant

Kas. 822, 70 Pac. 869; Holmes v. Ashtabula R. T. Co. 10 Ohio C. C. 638; East Tenn. V. & G. R. Co. v. Toppins, 10 Lea (Tenn.) 64.

[6] Fisher v. Central Lead Co. 156 Mo. 479, 56 S. W. 1107; Gorman v. Campbell, 14 Ga. 142.

[7] Davis v. S. 152 Ind. 34, 51 N. E. 928, 71 Am. St. 322. See Mason v. Silver, 1 Aik. (N. S.) (Vt.), 367.

[8] West Memphis P. Co. v. White, 99 Tenn. 256, 41 S. W. 583, 38 L. R. A. 427. See McGrew v. Missouri Pac. R. Co. 109 Mo. 582, 19 S. W. 53.

[9] Boyd v. Blue Ridge R. Co. 65 S. Car. 326, 43 S. E. 817; State v. Godfrey, 60 S. Car. 498, 39 S. E. 1; Allis v. U. S. 155 U. S. 117, 39 Sup. Ct. 91; Sparks v. S. 34 Tex. Cr. App. 86, 29 S. W. 264. An instruction merely announcing an abstract proposition cannot be complained of as error, in the absence of a request that it be explained, Hanson v. Gaar, Scott & Co. 68 Minn. 68, 70 N. W. 853.

[10] Birmingham Fire Ins. Co. v. Pulver, 126 Ill. 339, 18 N. E. 804, 9 Am. St. 581; Dinsmore v. State, 61 Neb. 418, 85 N. W. 445; Lyle v. McCormick H. M. Co. 108 Wis. 81, 84 N. W. 18, 51 L. R. A. 906.

[11] Hay v. Carolina M. R. Co. 41 S. Car. 542, 19 S. E. 976; Southern Bell T. & T. Co. v. Watts, 66 Fed. 460.

[12] Rucker v. State, 114 Ga. 13, 39 S. E. 902; Williams v. State, 130 Ala. 107, 30 So. 484; State v. Burton, 27 Wash. 528, 67 Pac. 1097; State v. Gannon, 75 Conn. 206, 52 Atl. 727. See White v. State, 133 Ala. 122, 32 So. 139; State v. West, 43 La. Ann. 1006, 10 So. 364.

stated that the accused, in his statement, impressed him with the belief that he was innocent, the court may instruct that what counsel "believe" is to have no influence with the jury.[13]

An instruction that the jury in arriving at their verdict should not be influenced by any feeling of sentiment, but that they should apply the law, as given them by the court, to the facts of the case, is proper.[14] Or that the jury may apply to the facts of the case "the same rules of good common sense, subject, of course, to a conscientious exercise of that common sense that you would apply to any other subject that comes under your consideration and that demands your judgment," is not improper.[15]

Where ancient documents and old notes of survey in the custody of the trustees of an estate were introduced in evidence in an ejectment suit it was held proper for the court in charging the jury to caution them to scrutinize carefully the documents to determine their genuineness.[16] An instruction in a civil case directing the jury that it is their sworn duty to enforce the law is of doubtful propriety, especially in an action brought by a wife against a dramshop keeper, for damages based upon the dram-shop law, for unlawfully selling intoxicating liquor to her husband, where punitive damages are not allowed unless actual damages are shown.[17]

§ 50. Cautionary instructions—Matters not raised on the trial. An instruction cautioning the jury as to a matter not raised on the trial is properly refused; as, for instance, the refusal of a charge that there is no evidence to warrant a finding of the existence of a conspiracy to defraud the creditors of a certain person, is proper, where no such claim had been made or suggested in the general charge or otherwise.[18] So an instruction caution-

[13] Smith v. S. 95 Ga. 472, 20 S. E. 291. Contra: Reeves v. S. 34 Tex. Cr. App. 483, 31 S. W. 382. Telling the jury that they should be closely governed by the instructions of the court is not improper in the way of caution, First C. M. H. Soc. v. Town of Rochester, 66 Vt. 501, 29 Atl. 810.

[14] State v. Petsch, 43 S. Car. 132, 20 S. E. 993.

[15] Dunlap v. United States, 165 U. S. 486, 17 Sup. Ct. 375. See Hinshaw v. State, 147 Ind. 334, 47 N. E. 157.

[16] Wilson v. Marvin-Rulofson Co. 201 Pa. St. 29, 50 Atl. 225.

[17] Henewacker v. Ferman, 152 Ill. 325, 38 N. E. 924.

[18] Rindskopf v. Myers, 87 Wis. 80, 57 N. W. 967, 41 Am. St. 23; Johnson v. St. Louis & S. R. Co. 173 Mo. 307, 73 S. W. 173 (relating to sympathy).

ing the jury that it is improper for them to arrive at the damages by taking the average of the different amounts each of the jurors may believe should be awarded, is properly refused, it being the duty of the court to instruct only as to the law of the case.[19] The refusal of an instruction that the jury should not draw any inference unfavorable to the credibility of certain witnesses brought from another state, because their expenses had been paid by the defendant, is proper where opposing counsel has made no unfavorable comment on the presence of such witnesses.[20]

§ 51. Cautionary instructions—Against opinion of court.—An instruction charging, by way of caution, that the jury should not regard anything contained in any of the instructions as intimating, in the slightest degree, any opinion of the court as to what any of the facts are, but that they should determine from the evidence, and from that alone, what are the facts, is a qualification of every instruction given on that branch of the case.[21]

§ 52. Cautionary instructions—Criminal cases.—So in a criminal case an instruction cautioning the jury that the crime with which the accused is charged is a very serious one, is not improper where they are also charged that the fact of the offense, being a serious one, will not warrant a conviction on slight evidence.[22] Also where several persons are jointly indicted, and one of them secures a separate trial from the others, the court may properly instruct the jury, that if they believe from the evidence that the defendants are guilty they should find a verdict accordingly, whether they believe the defendant, who secured the separate trial, had anything to do with the crime charged or not; that the jury may convict one or more of the defendants as the evidence may warrant; that they have nothing to do

[19] Sherwood v. Grand Ave. R. Co. 132 Mo. 339, 33 S. W. 774; Benjamin v. Metropolitan St. R. Co. 133 Mo. 274, 34 S. W. 590 (by lot). The refusal to instruct that a certain manner of arriving at a verdict in fixing damages is illegal is not error, Woodman v. Town of Northwood, 67 N. H. 307, 36 Atl. 255; Illinois, &c. R. Co. v. Freeman, 210 Ill. 270, 278 (condemnation proceeding; caution as to reaching verdict by averaging is proper).

[20] Klepsch v. Donald, 8 Wash. 162, 35 Pac. 621.

[21] Chicago & N. W. R. Co. v. Snyder, 117 Ill. 383, 7 N. E. 604. See Baldwin v. Lincoln County, 29 Wash. 509, 69 Pac. 1081.

[22] Commonwealth v. Harris, 168 Pa. St. 619, 32 Atl. 92.

with the influence a verdict of guilty may have in the trial of the defendant who secured such separate trial.[23] An instruction stating that it is the policy of the law that it is better that ninety and nine, or any number of guilty persons, should escape rather than that one innocent person should be convicted is improper and may be refused.[24] The court after charging the jury as to the law of self-defense may, without committing error, properly add by way of caution that "courts and jurors, however, must exercise due caution in applying these principles."[25]

§ 53. **Referring jury to the pleadings.**—It is common practice to refer to the pleadings in the giving of instructions in both civil and criminal cases. But if reference be made to the pleadings in such manner as to make the jury the judges of what are the material allegations it is error; it is for the court to determine as a question of law what are the material allegations.[26] Thus an instruction otherwise correct is not erroneous in directing the jury, if they find for the plaintiff, to assess the damages at such sum as from the evidence will be just compensation for the injury sustained, not exceeding the sum claimed in the declaration;[27] or an instruction that if the jury find the defendant guilty as alleged in the declaration, or some count thereof, they should find for the plaintiff is not erroneous in referring the jury to the declaration to ascertain the charges of negligence.[28]

A charge that if the jury believe from the evidence that the

[23] James v. S. 104 Ala. 20, 16 So. 94.

[24] Adams v. P. 109 Ill. 451, 50 Am. R. 617; Seacord v. P. 121 Ill. 631, 13 N. E. 194; P. v. Eubanks, 117 Cal. 652, 49 Pac. 1049, 40 L. R. A. 269; Coleman v. S. 111 Ind. 563, 13 N. E. 100; Barnes v. S. 111 Ala. 56, 20 So. 565; S. v. Tettaton, 159 Mo. 354, 60 S. W. 743; Cardon v. S. 84 Ala. 417; Ter. v. Burgess, 8 Mont. 57, 19 Pac. 558; P. v. Machado (Cal.) 63 Pac. 66.

[25] S. v. Young, 104 Iowa, 730, 74 N. W. 693.

[26] Baker v. Summers, 201 Ill. 52, 66 N. E. 302; McClure v. Williams, 65 Ill. 390; Texas & P. R. Co. v. Birchfield, 12 Tex. Cv. App. 145, 33 S. W. 1022. See Christie v. P. 206 Ill. 343; Pittsburg, &c. R. Co. v. Kinnare, 203 Ill. 388, 392, 67 N. E. 826.

[27] Calumet St. R. Co. v. Van Pelt, 173 Ill. 70, 73, 50 N. E. 678; Trumble v. Happy, 114 Iowa, 624, 87 N. W. 678.

[28] Central R. Co. v. Bannister, 195 Ill. 48, 51, 62 N. E. 864; Chicago & A. R. Co. v. Fisher, 141 Ill. 624, 31 N. E. 406; Southern Ind. R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722; Malott v. Hood, 201 Ill. 202, 66 N. E. 247; West C. St. R. Co. v. Lieserowitz, 197 Ill. 607, 612, 64 N. E. 718.

defendant is guilty of negligence as alleged in the declaration then the plaintiff is entitled to recover, is a proper form of instruction.[29] So an instruction that if the jury believe from the evidence that the plaintiff, without fault or negligence on his part, was injured by the wrongful acts of the defendant as alleged in the plaintiff's declaration they should find the defendant guilty, is proper although the evidence tends to support only one of the several counts of the declaration.[30]

An instruction referring the jury to the plaintiff's petition for a description of the land or lots involved in the controversy is not improper.[31] Also an instruction setting out the material allegations of the plaintiff's declaration and then concluding by stating that "if the jury believe from a preponderance of the evidence that the material allegations of the plaintiff's declaration are true the verdict should be for the plaintiff," is proper and not objectionable as submitting to the jury a question of law.[32] Also the giving of an instruction stating the nature of the action, the issues to be determined, what is necessary for the plaintiff to prove to entitle him to recover and then concluding that the grounds claimed by the plaintiff are more fully set out in his petition to which the jury are referred is not prejudicial error.[33] So the fact that the court in charging the jury sets out the pleadings in full, affords no ground for error, where in another part of the charge the real issues are clearly

[29] Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534, 542; Chicago & A. R. Co. v. Harrington, 192 Ill. 9, 25, 61 N. E. 622; Malott v. Hood, 201 Ill. 202, 206, 66 N. E. 247; Lake S. & M. S. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476; Illinois Cent. R. Co. v. Jernigan, 101 Ill. App. 1, 65 N. E. 88; Illinois Cent. R. Co. v. Jernigan, 198 Ill. 297, 65 N. E. 88; West Chicago St. R. Co. v. Buckley, 200 Ill. 260, 65 N. E. 708; Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366, 41 Am. St. 705; Illinois Cent. R. Co. v. Eicher, 202 Ill. 556, 572, 67 N. E. 376. Contra: Murray v. Burd (Neb.), 91 N. W. 278; Illinois, &c. R. Co. v. Thompson, 210 Ill. 226, 238.

[30] Pennsylvania Co. v. Backes, 133 Ill. 259, 24 N. E. 563; Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219, 234.

[31] Jenks v. Lansing Lumber Co. 97 Iowa, 342, 66 N. W. 231. An instruction that the affidavit in an attachment suit is not evidence, but that it is proper for the jury to find whether the statements in the affidavit are true or not, is proper, Gosch v. Niehoff, 162 Ill. 395, 44 N. E. 731.

[32] Illinois Cent. R. Co. v. Davenport, 177 Ill. 110, 52 N. E. 266, 69 Am. R. 212; East St. L. R. Co. v. Eggman, 170 Ill. 539, 48 N. E. 981; Stringam v. Parker, 159 Ill. 304, 310, 42 N. E. 794; St. Louis, Alton & T. H. R. Co. v. Holman, 155 Ill. 21 39 N. E. 573; Hartpence v. Rogers, 143 Mo. 623, 45 S. W. 650.

[33] Union P. R. Co. v. Sternberger, 8 Kas. App. 131, 54 Pac. 1101.

stated, so that the jury may know the exact points to be decided.[34]

But an instruction directing the jury to find the issues for the plaintiff if she has proved the material allegations of her declaration, is erroneous in the absence of further instruction as to what are the material allegations. What are material allegations is a question of law.[35] Also an instruction which states that the defendant by withdrawing his plea of general issue thereby admits all the material averments in the declaration without stating what are the material averments, is erroneous as tending to mislead the jury.[36] And an instruction referring the jury to the pleadings in a complicated case for a particular statement of the facts in issue upon which the plaintiff must recover, if at all, is erroneous.[37] But if the pleadings are short and simple the court, in charging the jury, may refer to them without any further explanation as to the issues.[38]

§ 54. Instructions limited to some counts.—If a declaration contains counts upon which a recovery cannot be had under the evidence then any reference to the declaration in charging the jury should be restricted to the counts upon which a recovery may be had. In such case it is error to instruct the jury, that "if you believe the plaintiff has made out his case as laid in his declaration the finding must be for the plaintiff."[39] And when an instruction is applicable to the facts of only one of the counts of the declaration which differs materially from the allegations of the other counts, forming the basis of a different

[34] Welch v. Union C. Life Ins. Co. 117 Iowa, 394, 90 N. W. 828. See Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366, 41 Am. St. 705; (Instruction held not referring to petition for the issues). Helt v. Smith, 74 Iowa, 667, 39 N. W. 81; Lake S. & M. S. R. Co. v. McIntosh, 140 Ind. 261, 38 N. E. 476.

[35] Baker v. Summers, 201 Ill. 52, 66 N. E. 302; Stevens v. Maxwell, 65 Kas. 835, 70 Pac. 873 (pleadings intricate and some of the issues not proved); Texas, &c. R. Co. v. Birchfield, 12 Tex. Cv. App. 145, 33 S. W. 1022; Dicken v. Liverpool S. & C. Co. 41 W. Va. 511, 23 S. E. 582; Wilbur v. Stoepel, 82 Mich. 344, 46 N. W. 7724, 21 Am. St. 563; Porter v. Knight, 63 Iowa, 365, 19 N. W. 282; East Tenn. V. & G. R. Co. v. Lee, 90 Tenn. 570, 18 S. W. 268; Baker v. Summers, 201 Ill. 52, 56, 66 N. E. 302.

[36] McClure v. Williams, 65 Ill. 390.

[37] Keatley v. Illinois Cent. R. Co. 94 Iowa, 685, 63 N. W. 560; Woodruff v. Hensley, 26 Ind. App. 592, 60 N. E. 312.

[38] Graybill v. Chicago, M. & St. P. R. Co. 112 Iowa, 738, 84 N. W. 946.

[39] Chicago N. S. St. R. Co. v. McCarthy, 66 Ill. App. 667.

right of action, then the instruction should be limited to that count; otherwise it should be refused.[40] Where one or more of the counts of the declaration have been dismissed in the presence and hearing of the jury, an instruction referring to the declaration or any count thereof will be understood to refer only to the counts which have not been abandoned or dismissed.[41] There may be defective counts in a declaration upon which a recovery could not be had, and if so, an instruction referring to the declaration should be limited to the good counts.[42]

§ 55. **In criminal cases—Referring to indictment.**—In a criminal case the court in its instructions may properly refer the jury to the indictment for a description of the offense charged instead of setting it out in the language of the statute.[44] And it is proper for the court in charging the jury to state the different degrees or included offenses contained in the indictment, and to inform the jury on which charge the defendant is on trial.[45] And a charge that the jury must determine of which one or more of the counts of an indictment the defendant is guilty is not objectionable where the jury are also instructed that if they conclude the defendant is not guilty, then they should so state in their verdict.[46] Where the prosecution is limited to some one or more of the counts of an indictment an instruction charging that if the jury believe from the evidence that certain facts (stating them) have been established as charged in the indictment they should find the defendant guilty, instead of limiting the inquiry to the facts in the particular count or charge on which the defendant is on trial is not erroneous where the in-

[40] Village of Jefferson v. Chapman, 127 Ill. 447, 20 N. E. 33; First National Bank of Monmouth v. Dunbar, 118 Ill. 630, 9 N. E. 186.

[41] Slack v. Harris, 200 Ill. 96, 115, 65 N. E. 669; West Chicago St. R. Co. v. Buckley, 200 Ill. 260, 262, 65 N. E. 708.

[42] Chicago & A. R. Co. v. Eselin, 86 Ill. App. 94; Grand Tower Mfg. Co. v. Ullman, 89 Ill. 244. See Chicago & A. R. Co. v. Anderson, 166 Ill. 572, 46 N. E. 1125. Contra: Kimball v. Paye, 96 Me. 487, 52 Atl. 1010. A statute which authorizes the court to instruct the jury to disregard any faulty counts of a declaration, means such counts only as would be insufficient to support a judgment after verdict, Consolidated Coal Co. v. Scheiber, 167 Ill. 539, 543, 47 N. E. 1052.

[44] Parker v. P. 97 Ill. 32, 37. See S. v. David, 131 Mo. 380, 33 S. W. 28. Contra: Ter. v. Baca (N. Mex.), 71 Pac. 460.

[45] Worthan v. State (Tex. Cr. App.), 65 S. W. 526.

[46] S. v. Moore, 49 S. Car. 438, 27 S. E. 454.

struction enumerates the facts constituting the crime as set forth in the count or charge to which the prosecution is limited.[47]

§ 56. Whole law in one instruction unnecessary.—It is not necessary that each instruction should contain the whole law of the case, nor that it should call attention to the contentions of the parties to the action. It is sufficient if the series of instructions considered as a whole fully and fairly announce the rules of law applicable to the issues involved.[48] Nor is the court required to give a separate instruction on each material fact or element of a case.[49] But the fact that an instruction embraces more than one proposition of law does not render it bad.[50]

So an instruction which is complete within itself and relates to the issues, is not erroneous simply because it does not embrace other propositions which would be appropriate.[51] It is therefore not improper to state the law applicable to particular questions or particular parts of the case as separate questions in giving instructions.[52] But an instruction relating to a particular proposition or element involved in a case should be complete within itself. For instance, an instruction applying the law of reasonable doubt to self-defense is imperfect if it fails to set forth the constituents of self-defense.[53] So every instruction asked by the plaintiff is not required to have embodied in it every fact or element essential to sustain his cause of action;

[47] Sykes v. P. 127 Ill. 117, 126, 19 N. E. 705. An instruction properly refers to the time when an offense is alleged to have been committed, as "on or about" the day stated in the indictment, or at any time within the statute of limitations, Ferguson v. S. 52 Neb. 432, 72 N. W. 590; Phillips v. S. (Tex. Cr. App.), 45 S. W. 709.

[48] Lilly v. P. 148 Ill. 477, 36 N. E. 95; Stratton v. Central City H. R. Co. 95 Ill. 33; Hessing v. McCloskey, 37 Ill. 351; Illinois Iron & M. Co. v. Weber, 196 Ill. 526, 63 N. E. 1008; West Chicago St. R. Co. v. Scanlan, 168 Ill. 34, 48 N. E. 149; Smith v. Smith, 169 Ill. 623, 48 N. E. 306; Pardridge v. Cutter, 168 Ill. 504, 512, 48 N. E. 125; Judy v. Sterrett, 153 Ill. 94, 100, 38 N. E. 633; Nebraska N. Bank v. Burke, 44 Neb. 234, 62 N. W. 452. See also Catholic Order of Foresters v. Fitz, 181 Ill. 206, 54 N. E. 952; Cole v. S. 75 Ind. 511; Chicago, R. I. & P. R. Co. v. Groves, 56 Kas. 611, 44 Pac. 628; S. v. Hope, 102 Mo. 410, 14 S. W. 985.

[49] S. v. Garth, 164 Mo. 553, 65 S. W. 275.

[50] Gemmill v. Brown, 25 Ind. App. 6, 56 N. E. 691.

[51] Hayes v. S. 114 Ga. 25, 40 S. E. 13. See Tucker v. S. 114 Ga. 61, 39 S. E. 926.

[52] Chicago & E. I. R. Co. v. Hines, 132 Ill. 161, 169, 23 N. E. 1021, 22 Am. St. 515. See also Tucker v. S. 114 Ga. 61, 39 S. E. 926; Hayes v. S. 114 Ga. 25, 40 S. E. 13.

[53] Miller v. S. 107 Ala. 40, 19 So. 37; Worden v. Humeston & S. R. Co. 72 Iowa, 201, 33 N. W. 629.

nor is it necessary to negative matters of mere defense.[54] So where one instruction states one ground of liability and another states another ground, there is a sufficient statement of the law without stating both grounds in one instruction.[55] Thus where negligence is alleged as a material element in the plaintiff's declaration each instruction is not required to state every ground of liability averred in the different counts of the declaration. On the contrary, an instruction may be framed touching upon each separate charge of negligence as set out in any of the counts.[56] An instruction to guide the jury as to the measure of damages is not required to recapitulate all the different elements constituting a cause of action which have been stated in other instructions. Its design is to inform the jury what damages they shall award in case they find the plaintiff entitled to recover.[57]

§ 57. Instructions as to damages—Measure of.—A proper instruction should be given the jury, when requested, stating the rule as to the measure of damages.[58] But where the charge as a whole correctly states the rule as to the measure of damages that is sufficient without stating the rule in any one instruction.[59] A charge that the jury may give such damages as they think to be in proportion to the injury resulting from the death of the plaintiff's husband is sufficient where no instructions are asked for correct measure of damages.[60] If an instruction as to the measure of damages should be so broad as to allow remote or fanciful damages it is erroneous.[61] The instructions should confine the jury to such damages as are reasonably certain to follow from the injury alleged.[62]

[54] Underwood v. Wolf, 131 Ill. 425, 442, 23 N. E. 598, 19 Am. St. 40; Village of Sheridan v. Hibbard, 119 Ill. 307, 310, 9 N. E. 901.

[55] Nebraska Nat. Bank v. Burke, 44 Neb. 234, 62 N. W. 452.

[56] Chicago & A. R. Co. v. Maroney, 170 Ill. 525, 48 N. E. 953, 62 Am. St. 396.

[57] Chicago & A. R. Co. v. Harrington, 192 Ill. 9, 27, 61 N. E. 622; McMahon v. Sankey, 133 Ill. 636, 641, 24 N. E. 1027; Pennsylvania Co. v. Marshall, 119 Ill. 399, 404, 10 N. E. 220.

[58] Cole v. City of Boston, 181 Mass. 374, 63 N. E. 1061; Carpenter v. City of Red Cloud, 64 Neb. 126, 89 N. W. 637.

[59] Rath v. Rath (Neb.) 89 N. W. 612.

[60] Galveston, H. & S. A. R. Co. v. Worthy (Tex. Cv. App.), 27 S. W. 426.

[61] Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711.

[62] Pennsylvania Co. v. Files, 65 Ohio St. 403, 407, 62 N. E. 1047.

§ 58. **Instructions as to damages—Personal injury.**—Where an instruction properly presents the theory of the plaintiff as to the amount of damages it is not erroneous in not excluding the idea of damages arising from injuries aggravated by the plaintiff's own negligence.[62*] An instruction charging that the jury should allow such damages as "under all the evidence would be just compensation for the injury" is not erroneous in not excluding punitive damages.[63] In a personal injury case a charge that the jury should give "such damages for bodily pain and mental anxiety, as they believe the plaintiff is justly entitled to recover," is proper in connection with another instruction, stating that "the damages should be no greater and no less than they believe from the evidence the plaintiff is entitled to recover."[64] An instruction that if the jury find the defendant guilty, and that the plaintiff has sustained damages from the injury, they have a right, in estimating such damages, to take into consideration all the facts and circumstances in evidence before them, and the nature and effect of the plaintiff's physical injuries, if any, shown by the evidence to have been sustained from the cause alleged in the declaration, her suffering in body and mind, if any, resulting from such injuries, is proper.[65]

§ 59. **Instructions as to damages—Exemplary or punitive.**—An instruction as to exemplary damages which fails to state what facts must be established by the evidence to warrant such damages, is improper.[66] In an action of trespass for assault and

[62*] Hannibal v. St. Joseph R. Co. v. Martin, 111 Ill. 233; Wabash, St. L. & P. R. Co. v. Rector, 104 Ill. 305.

[63] Whiting v. Carpenter (Neb.), 93 N. W. 926.

[64] Boltz v. Town of Sullivan, 101 Wis. 608, 77 N. W. 870. In Tennessee it has been held that there can be no judgment for damages in a personal injury case where no instructions have been given on the subject of damages, Citizens' St. R. Co. v. Burke, 98 Tenn. 650, 40 S. W. 1088.

[65] City of Chicago v. McLean, 133 Ill. 148, 24 N. E. 527; Central R. Co. v. Serpass, 153 Ill. 379, 384, 39 N. E. 119; Springfield C. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; Chicago City R. Co. v. Anderson, 182 Ill. 298, 55 N. E. 366; Gartside Coal Co. v. Turk, 147 Ill. 120, 126, 35 N. E. 467; Lake Shore & M. S. R. Co. v. Hundt, 140 Ill. 525, 30 N. E. 458; Chicago C. R. Co. v. Mead, 206 Ill. 177; Hannon v. St. Louis Tr. Co. (Mo. App.), 77 S. W. 158. For the purpose of determining the amount of damages where an injury to the person is permanent, it is proper for the court to instruct the jury as to the use of tables of mortality, Savannah F. & W. R. Co. v. Austion, 104 Ga. 614, 30 S. E. 770.

[66] Kutner v. Fargo, 45 N. Y. S. 753, 20 Misc. 207.

battery it is proper to instruct that if the jury find the defendant guilty they have a right to take into consideration the financial circumstances of both the plaintiff and the defendant in assessing damages.[67]

§ 60. Misleading instructions—Obscure, though correct.—When instructions are so drawn that they will be more likely to mislead than instruct a jury they should be refused, although by careful study and analysis it may appear that such instructions announce correct principles of law.[68] Although an instruction may technically state the law correctly, yet if expressed in such language as to be misunderstood by the jurors in its application the court is not bound to give it, and does not err in refusing it.[69] So a charge, though not objectionable in point of law, but which leaves the jury to draw incorrect inferences, is erroneous where a different verdict would have been rendered had the jury not been mislead.[70] But the mere fact that an instruction may have a tendency to mislead the jury cannot be urged as material error.[71] A specific charge based on particular facts, which, if followed by the jury, would cause an erroneous verdict, is not cured by general charges.[72]

§ 61. Misleading instructions—Susceptible of two meanings. Also an instruction which is susceptible of two meanings, one stating the law correctly and the other incorrectly, having a tendency to mislead the jury, is erroneous.[73] So if an instruction is so framed that others are needed to explain it, it is properly refused.[74]

§ 62. Misleading instructions—If evidence is conflicting.—An instruction that "if the jury do not believe the evidence they will find the defendant not guilty," is properly refused in that

[67] McNamara v. King, 7 Ill. (2 Gil.) 432.

[68] Baxter v. P. 8 Ill. (3 Gil.) 368, 380; Cunningham v. P. 210 Ill. 410.

[69] Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711. See Calquhour v. Wells & Fargo Co. 21 Nev. 459, 33 Pac. 977 (unintelligible).

[70] Little M. R. Co. v. Wetmore, 19 Ohio St. 134.

[71] Towns v. S. 111 Ala. 1, 20 So. 598; O'Donnell v. Rodiger, 76 Ala. 222, 52 Am. R. 322. See Palmore v. S. 29 Ark. 248.

[72] Pittsburg, C. & St. L. R. Co. v. Krouse, 30 Ohio St. 240, 27 Am. R. 443.

[73] McCracken v. Webb, 36 Iowa, 551; Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727; Ætna Ins. Co. v. Reed, 33 Ohio St. 283.

[74] Crawford v. S. 112 Ala. 1, 21 So. 214. See Adams v. S. 29 Ohio St. 412.

it is obscure and tends to confuse and mislead. Especially is this true where the evidence is conflicting.[75] An instruction stating that the undisputed evidence does not show that the plaintiff is entitled to recover, though true, is misleading where the evidence is conflicting.[76]

§ 63. Misleading Instructions—Generally erroneous.—Generally instructions which are misleading or confusing are erroneous.[77] An instruction which is obscure and uncertain in its meaning is improper. For instance, it is improper to instruct the jury that if they believe that such mental difficulty existed as would preclude the exercise of malice they must find the defendant not guilty.[78]

§ 64. Misleading instructions—Cured by others.—Although an instruction may appear to be misleading or confusing, if when taken in connection with others it forms part of a correct statement of the law, the error in that respect will become harmless. Thus, for example, for the court to charge the jury "to find out what the truth of the case is, what the real facts are, and look to the evidence for that purpose and to the prisoner's statement, if you think it worthy of credit," was held not to be misleading, where the jury were also instructed that they could believe a part of such statement and reject a part.[79]

§ 65. Misleading instructions—Illustrations.—An instruction

[75] Koch v. S. 115 Ala. 99, 22 So. 471.

[76] Birmingham, R. & E. Co. v. Wildman, 119 Ala. 547, 24 So. 548.

[77] Tichenor v. Newman, 186 Ill. 264, 57 N. E. 826; Sullivan v. Collins, 107 Mich. 291, 83 N. W. 310; Louisville & N. R. Co. v. Sandlin, 125 Ala. 585, 28 So. 40, 82 Am. St. 264; Nicklaus v. Burns, 75 Ind. 98; Moore v. S. 65 Ind. 385; Hill v. Newman, 47 Ind. 187; Ætna Ins. Co. v. Reed, 33 Ohio St. 292; Littleton v. S. 128 Ala. 31, 29 So. 390; S. v. Simas, 25 Nev. 432, 62 Pac. 242; Peterson v. S. 74 Ala. 34; Horton v. Com. 99 Va. 848, 38 S. E. 184; Hoffmann v. Cockrell, 112 Iowa, 141, 83 N. W. 898; Miller v. Dumon, 24 Wash. 648, 64 Pac. 804; Fruit D. Co. v. Russo, 125 Mich. 306, 84 N. W. 308; North C. St. R. Co. v. Hutchinson, 191 Ill. 104 60 N. E. 850; O'Brien v. Northwestern I. & B. Co. 82 Minn. 136, 84 N. W. 735; S. v. Komstett, 62 Kas. 221, 61 Pac. 805; P. v. Kelly, 132 Cal. 430, 64 Pac. 563.

[78] P. v. Barthleman, 120 Cal. 7, 52 Pac. 112; Thomas v. S. 133 Ala. 139, 32 So. 250; Adams v. S. 133 Ala. 166, 31 So. 851. See generally: Morehead v. Adams, 18 Neb. 569, 26 N. W. 242; Street v. S. 67 Ala. 87; Perry v. Dubuque, S. W. R. Co. 36 Iowa, 102; Gordon v. City of Richmond, 83 Va. 436, 2 S. E. 727; McKinney v. Snyder, 78 Pa. St. 497; S. v. Robinson, 20 Wis. 713; James v. Missouri Pac. R. Co. 107 Mo. 480, 18 S. W. 31; Chattanooga R. & C. R. Co. v. Owen, 90 Ga. 265, 15 S. E. 853; Central R. Co. v. Haslett, 74 Ga. 59.

[79] Westbrook v. S. 97 Ga. 189, 22 S. E. 398.

that criminal intent must be "strictly proved" in order to warrant a conviction is properly refused, as it tends to mislead the jury.[80] To state that if the jury "find certain facts from the evidence, those facts are proved" is confusing and meaningless.[81] So also an instruction directing the attention of the jury to a single fact which has no bearing on the merits of the case, is misleading.[82] Instructions attempting to blend separate and distinct legal propositions in the same sentence or paragraph are usually erroneous in that such blending tends to confuse and mislead.[83] An instruction stating that "fraud is never presumed, but must be affirmatively proved; that the law presumes that all men act fairly and honestly; that their dealings are in good faith and without intention to wrong, cheat or defraud others; and when a transaction called in question is equally capable of two constructions, one that is fair and honest and one that is dishonest, then the law is that the fair and honest construction must prevail and the transaction called in question must be presumed to be honest and fair" was held to be misleading, as having a tendency to induce the jury to disregard the preponderance of evidence in the event they found that it showed that the transaction was dishonest.[84]

An instruction which charges that "if the jury believe from the evidence that the sidewalk in question, where the plaintiff claims to have received her injury, was repaired and placed in good condition by the city within a reasonable time prior to the alleged accident, and if the jury believe from the evidence that said walk afterwards became out of repair without actual notice to the city then the plaintiff cannot recover" was held to be obscure and misleading. It is not clear what is meant by the expression "within a reasonable time prior to the alleged accident." The city was bound to exercise reasonable prudence and diligence in the construction and maintenance of its sidewalks. But just what period of time between the alleged repair of the sidewalk and the happening of the accident

[80] S. v. Debott, 104 Iowa, 105, 73 N. W. 490.

[81] Sanders v. P. 124 Ill. 227, 16 N. E. 81; P. v. Carroll, 92 Cal. 568, 28 Pac. 600.

[82] Emery v. Hoyt, 46 Ill. 258, 262.

[83] Chicago, B. & Q. R. Co. v. Johnson, 103 Ill. 512, 525.

[84] A. F. Shapleigh Hardware Co. v. Hamilton, 70 Ark. 319, 68 S. W. 490.

should be regarded as reasonable, and for what purpose it should be so regarded, is not apparent.[85] In an action for personal injury, where the plaintiff in his pleading alleges several acts of negligence of the defendant as the cause of his injury, it is misleading and improper in charging the jury to single out each of the several acts and state that any one of such acts alone would not entail liability.[86] Also an instruction is misleading which conveys the impression that only one witness testified to a material fact in issue, when other witnesses testified on the same issue.[87] And an instruction that a person dealing with an agent is bound to know at his peril what the power of an agent is, and to understand its legal effect, is erroneous.[88]

§ 66. Argumentative instructions — Generally. — Instructions

[85] City of Sterling v. Merrill, 124 Ill. 522, 525, 17 N. E. 6.

[86] Lake Shore & M. S. R. Co. v. Whidden, 23 Ohio C. C. 85.

[87] Idaho Mercantile Co. v. Kalanquin (Idaho), 66 Pac. 933.

[88] Colquhonn v. Wells, Fargo & Co. 21 Nev. 459, 33 Pac. 977.

Instructions in the following cases were held misleading: Rumbold v. Royal League, 206 Ill. 518; Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 47, 7 N. E. 55; McHale v. McDonnell, 175 Pa. St. 632, 34 Atl. 966, 34 L. R. A. 159; Grim v Murphy, 110 Ill. 271, 276; White v. Harris, 206 Ill. 596; Chicago & E. R. Co. v. Jacobs, 110 Ill. 415; Elston & Wheeling Gravel Co. v. Pierce, 96 Ill. 584; S. v. Grugin, 147 Mo. 39, 47 S. W. 1058, 42 L. R. A. 774; Nelson v. Spears, 16 Mont. 351, 40 Pac. 786; Anderson v. Avis, 62 Fed. 227; Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500; S. v. Anderson, 6 Idaho, 706, 59 Pac. 180; Wallace v. S. 124 Ala. 87, 26 So. 932; McCoggle v. S. 41 Fla. 525, 26 So. 734; Turner v. S. 124 Ala. 59, 27 So. 272; Morris v. S. 124 Ala. 44, 27 So. 336; Buel v. S. 104 Wis. 132, 80 N. W. 78; Dixon v. Labry, 16 Ky. L. R. 522, 29 S. W. 21; Parks v. Gulf, C. S. & F. R. Co. (Tex. Civ. App.), 30 S. W. 708; Anderson v. Timberlake, 114 Ala. 377, 22 So. 431; Hebbe v. Town of Maple Creek, 111 Wis. 480, 87 N. W. 459; S. v. McDowell, 129 N. Car. 523, 39 S. E. 840, (stating that defendant went out of his way to go home); Gulf C. & S. F. R. Co. v. Thompson (Tex. Cv. App.), 35 S. W. 319; Harter v. City of Marshall (Tex. Cv. App.), 36 S. W. 294.

Instructions held not misleading in the following cases: Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757 (slander); Citizens' Gas L. Co. v. O'Brien, 118 Ill. 174, 182, 8 N. E. 310; Wheeler v. S. 158 Ind. 687, 63 N. E. 975; Mosher v. Rogers, 117 Ill. 446, 456, 5 N. E. 583; International & G. N. R. Co. v. Bonatz (Tex. Cv. App.), 48 S. W. 767; Knowles v. Murphy, 107 Cal. 107, 40 Pac. 111; Larkin v. Burlington, C. R. & N. R. Co. 91 Iowa, 654, 60 N. W. 195; Landrum v. Guerra (Tex. Cv. App.), 28 S. W. 358; Riley v. Salt Lake R. T. Co. 10 Utah, 428, 37 Pac. 681; Hildreth v. Hancock, 156 Ill. 618, 41 N. E. 155; Chapell v. Schmidt, 104 Cal. 511, 38 Pac. 892; P. v. McKane, 143 N. Y. 455, 38 N. E. 950; Galveston, H. & S. A. R. Co. v. Buch (Tex. Cv. App.), 65 S. W. 681; Galveston, H. & S. A. R. Co. v. Parvin (Tex. Cv. App.), 64 S. W. 1008; Elliott v. Elliott, 15 Ky. L. R. 274, 23 S. W. 216; Gulf, C. & S. F. R. Co. v. Dansbank, 6 Tex. Cv. App. 385, 25 S. W. 295; S. v. Dunn, 116 Iowa, 219, 89 N. W. 984.

containing the reasons for a conclusion are argumentative, especially if they are long, verbose and uncertain in their meaning. Such instructions are generally confusing and misleading, and should be refused.[89] Thus an instruction which tells the jury that their verdict, whatever it may be, will not mean that any witness has sworn falsely is argumentative and improper.[90] An instruction stating the reasons why the testimony of expert witnesses is unreliable and unsatisfactory is erroneous as being argumentative.[91] So an instruction containing a lengthy recital of the facts on one side of a case without reference to the facts on the other side is argumentative, and should be refused.[92]

§ 67. Argumentative instructions—Not necessarily erroneous. But the fact that an instruction may be argumentative is not of itself material error.[93] Argumentative instructions cannot be urged as ground for reversal unless they contain incorrect statements of the law.[94] So where a charge contains a statement

[89] Freidman v. Wersz, 8 Okla. 392, 58 Pac. 613; Riddle v. Webb. 110 Ala. 599, 18 So. 323; Hanna v. Hanna, 3 Tex. Cv. App. 51, 21 S. W. 720; Spraggins v. S. (Ala.) 35 So. 1003; Pittsburg, &c. R. Co. v. Baufill (Ill.), 69 N. E. 499; Southern R. Co. v. Howell, 135 Ala. 639, 34 So. 6.

[90] Boyett v. S. 130 Ala. 77, 30 So. 475.

[91] In re Blake's Estate, 136 Cal. 306, 68 Pac. 827, 89 Am. St. 35.

[92] Coal Run Coal Co. v. Jones, 127 Ill. 379, 385, 8 N. E. 865, 20 N. E. 89; Pittsburg, C. C. & St. L. R. Co. v. Banfill, 206 Ill. 556; Chicago, B. & Q. R. Co. v. Sykes, 96 Ill. 162, 171; Huschle v. Morris, 131 Ill. 575, 587, 23 N. E. 643; Burns v. P. 126 Ill. 282, 18 N. E. 550; Chicago, M. & St. R. Co. v. Krueger, 124 Ill. 457, 17 N. E. 52; Ludwig v. Sager, 84 Ill. 100; Fuller v. Gray, 124 Ala. 388, 27 So. 458; Cowie v. City of Seattle, 22 Wash. 659, 62 Pac. 121; Merritt v. Merritt, 20 Ill. 80; Teague v. Lindsey, 106 Ala. 266, 17 So. 538; Sheehan v. P. 131 Ill. 22, 25, 22 N. E. 818; Lake S. & M. S. R. Co. v. Parker, 131 Ill. 557, 566, 23 N. E. 237; American Bible Soc. v. Price, 115 Ill. 623, 638, 5 N. E. 126; Hunt v. McMullen (Tex. Cv. App.), 46 S. W. 666; Thompson v. Force, 65 Ill. 370; Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499, 505; Louisville & N. R. Co. v. York, 128 Ala. 305, 30 So. 676; King v. Franklin, 132 Ala. 559, 31 So. 467; Hall v. S. 130 Ala. 45, 30 So. 422; Willis v. S. 134 Ala. 429, 33 So. 226. See generally, Chapman v. S. 61 Neb. 888; 86 N. W. 907; Gilmore v. S. 126 Ala. 20, 28 So. 595; Keeler v. Stuppe, 86 Ill. 309; City of Birmingham v. Starr, 112 Ala. 98, 20 So. 424; Bolling v. S. 54 Ark. 588, 16 S. W. 658; Bodine v. S. 129 Ala. 106, 29 So. 926; Bates v. Benninger, 2 Cin. Super. Ct. (Ohio) 568; P. v. Crawford, 48 Mich. 498, 12 N. W. 673; Weyrich v. P. 89 Ill. 90.

[93] Coghill v. Kennedy, 119 Ala. 641, 24 So. 459; Carleton v. S. 43 Neb. 373, 61 N. W. 699; Karr v. S. 106 Ala. 1, 17 So. 328.

[94] Karr v. S. 106 Ala. 1, 17 So. 328; Baldwin v. S. 111 Ala. 11, 20 So. 528; Cesure v. S. 1 Tex. App. 19; Hurley v. S. 29 Ark. 17.

of the reasons for a conclusion, and in so doing the court elaborates more than necessary, there can be no ground for error if the instructions are relevant and otherwise correct.[95]

§ 68. **Argumentative instructions—Illustrations.**—An instruction which directs the jury that if they believe that certain witnesses testified that the offense was committed on the 14th or 15th day of April, and that the defendant was sick in bed from the 10th to the 20th of that month, they should acquit the defendant, was properly refused as being argumentative.[96] A charge that if the testimony be such that two conclusions may be reasonably drawn from it, one tending to prove the defendant's innocence and the other tending to establish his guilt, justice, humanity and the law demand that the jury should adopt the former and acquit the defendant, is argumentative, and therefore properly refused.[97]

§ 69. **Interrogative instructions—Improper.**—Instructions submitted in the form of questions to the jury are improper as intimating an opinion on the weight of the evidence. Thus, for instance, to charge the jury by asking: Is that the way an honest man would act? Do honest people act so? amounts to the expression of an opinion.[98]

[95] Thrall v. Wilson, 17 Pa. Super. Ct. 376.

[96] Frost v. S. 124 Ala. 71, 27 So. 550; Southern R. Co. v. Howell, 135 Ala. 639, 34 So. 6; Rumbold v. Supreme Council, &c. (Ill.), 69 N. E. 590; Chicago, M. & St. P. R. Co. v. O'Sullivan, 143 Ill. 60, 32 N. E. 398; Ragland v. S. 125 Ala. 12, 27 So. 983. See Com. v. Brubaker, 13 Pa. Super. Ct. 14; Chicago, B. & Q. R. Co. v. Warner, 123 Ill. 49, 14 N. E. 206; Jacksonville, &c. St. R. Co. v. Wilhite, 209 Ill. 84, 86.

[97] Bryant v. S. 116 Ala. 445, 23 So. 40; Rogers v. S. 117 Ala. 9, 22 So. 666; Naugher v. S. 116 Ala. 463, 23 So. 26. Held to be argumentative: Dennis v. S. 118 Ala. 72, 23 So. 1002; Cordill v. Moore, 17 Tex. Cv. App. 217, 43 S. W. 298; White v. S. 111 Ala. 92, 21 So. 330; Thomas v. S. 95 Ga. 484, 22 S. E. 315; Missouri, K. & T. R. Co. v. Carter (Tex.), 68 S. W. 159; Riddle v. Webb, 110 Ala. 599, 18 So. 323; Kansas City, M. & B. R. Co. v. Henson, 132 Ala. 528, 31 So. 590; Watkins v. S. 133 Ala. 88, 32 So. 627 (on character); South Chicago C. R. Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075; City of Bonham v. Crider (Tex. Cv. App.), 27 S. W. 419; Mitchell v. S. 133 Ala. 65, 32 So. 132 (on flight); Walkley v. S. 133 Ala. 183, 31 So. 854; Campbell v. S. 133 Ala. 81, 31 So. 802; Winter v. S. 133 Ala. 176, 31 So. 717; Morris v. Lachman, 68 Cal. 112. 8 Pac. 799.

[98] Blashfield Instructions, § 51, p. 127, citing S. v. Norton, 28 S. Car. 572, 6 S. E. 820; S. v. Addy, 28 S. Car. 4, 4 S. E. 814; Freidrick v. Ter. 2 Wash. 358, 26 Pac. 976; S. v. Jenkins, 21 S. Car. 595. Instructions in this form are argumentative. But see McLain v. Commonwealth, 99 Pa. St. 86.

§ 70. Instructions construed as a whole.—It is a familiar rule that in passing upon a single instruction it must be considered in connection with all the other instructions bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, the court will not entertain complaint because the instruction complained of does not contain all the law relating to the particular subject, unless under all the peculiar circumstances of the case the court is of the opinion that it is misleading.[99] The instructions will not be construed in fragmentary parts, but all of them must be construed together.[100] Where the whole charge clearly states the law of a case an imperfection in an instruction or paragraph standing alone will be harmless.[101] The presumption is that

[99] McCoy v. P. 175 Ill. 224, 230, 51 N. E. 777; Illinois Cent. R. Co. v. Cosby, 174 Ill. 109, 119, 50 N. E. 1011; Baker v. Baker, 202 Ill. 595, 618, 67 N. E. 410; Gainey v. P. 97 Ill. 370, 377; Bartley v. S. 53 Neb. 310, 73 N. W. 744; Harrell v. S. 31 Tex. Cr. App. 204, 45 S. W. 581; S. v. McCoy, 15 Utah, 136, 49 Pac. 420; Murray v. Burd (Neb.), 91 N. W. 278; Sloan v. Fist (Neb.), 89 N. W. 760; Cleveland, C. & C. R. Co. v. Terry, 8 Ohio St. 570; White v. New York, C. & St. L. R. Co. 142 Ind. 648, 42 N. E. 456; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 610, 64 N. E. 718; P. v. Glover (Cal.), 74 Pac. 749; Lawder v. Henderson, 36 Kas. 754, 14 Pac. 164; Beidler v. King, 202 Ill. 302, 314.

[100] Newport v. S. 140 Ind. 299, 39 N. E. 926; State v. Kennedy (Iowa), 62 N. W. 673; P. v. Anderson, 105 Cal. 32, 38 Pac. 513; S. v. Rathbun, 74 Conn. 524, 51 Atl. 540; Conway v. Vizzard, 122 Ind. 271, 23 N. E. 771; Knight v. S. (Fla.), 32 So. 110; Brown v. S. 105 Ind. 385, 5 N. E. 900; Atkinson v. Dailey, 107 Ind. 117, 7 N. E. 902; Deig v. Morehead, 110 Ind. 461, 11 N. E. 458; Jenks v. Lansing Lumber Co. 97 Iowa, 342, 66 N. W. 231; S. v. Martin, 47 S. Car. 67, 25 S. E. 113; Omaha, &c. R. & B. Co. v. Levingston, 49 Neb. 17, 67 N. W. 887; Whelpley v. Stroughton, 119 Mich. 314, 78 N. W. 137; Chicago, B. & Q. R. Co. v. Oyster, 58 Neb. 1, 78 N. W. 359; Zimmer v. Third Ave. R. Co. 55 N. Y. S. 308; Stokes v. Ralph Tp. 187 Pa. St. 333, 40 Atl. 958; Kiekhoefer v. Hidershide, 113 Wis. 280, 89 N. W. 189; Haydensville M. & Mfg. Co. v. Steffler, 17 Pa. Super. Ct. 609; Bay City Iron Co. v. Emery, 128 Mich. 506, 87 N. W. 652; Kohn v. Johnson, 97 Iowa, 99, 66 N. W. 76; Decatur C. S. O M. Co. v. Johnson (Tex. Cv. App.), 35 S. W. 951; Farmers' & Mer. Bank v. Riddle, 115 Ga. 400, 41 S. E. 580; Blacman v. Edsall (Colo. App.), 68 Pac. 790; Hufford v. Lewis, 29 Ind. App. 202, 64 N. E. 99; Edwards v. Chicago & A. R. Co. 94 Mo. App. 36, 67 S. W. 950; Whittlesey v. Burlington, C. R. & N. R. Co. (Iowa) 90 N. W. 516; Southern Ind. R. Co. v. Harrell (Ind. App.), 66 N. E. 1016; Wampler v. House, 30 Ind. App. 513, 66 N. E. 500; Lofland v. Goben, 16 Ind. App. 67, 44 N. E. 553.

[101] Bay City Iron Co. v. Emery, 128 Mich. 506, 87 N. W. 652; Faust v. Hosford, 119 Iowa, 97 93 N. W. 58; City of Omaha v. Meyers (Neb.), 92 N. W. 743; Smurr v. S. 88 Ind. 504; De Goey v. Van Wyk, 97 Iowa, 491, 66 N. W. 787; P. v. Ricketts, 108 Mich. 584, 66 N. W. 483; S. v. Butler, 47 S. Car. 25, 24 S. E. 991.

the jury, in arriving at their verdict, will consider the instructions as a whole; that they will notice the qualification which one instruction makes of another when considered together.[102] But whether one instruction qualifies another without reference to it, must depend upon its position in the series and its connection with the others given.[103]

§ 71. **Instructions of both parties construed together.**—The instructions given for both parties must be construed together, and when so considered, if they correctly state the law as a whole, any error appearing in one series will be deemed corrected by the other.[104] And although an instruction may be faulty in some particular when standing alone, yet when construed in connection with all the others given for both sides on the same subject the error may be cured.[105] Hence there can be no ground

[102] Galesburg & Great E. R. Co. v. Milroy, 181 Ill. 243, 247, 54 N. E. 939; Rock I. & P. R. Co. v. Leisly Brewing Co. 174 Ill. 547, 556, 51 N. E. 572.

[103] Springdale Cemetery Asso. v. Smith, 24 Ill. 481, 483; Murphy v. P. 37 Ill. 447, 458.

[104] Lourance v. Goodwin, 170 Ill. 390, 394, 48 N. E. 903; Lawrence v. Hagerman, 56 Ill. 68; Stringam v. Parker, 159 Ill. 310, 42 N. E. 794; England v. Fawbush, 204 Ill. 384, 395, 68 N. E. 526; Wenona Coal Co. v. Holmquist, 152 Ill. 581, 593, 38 N. E. 946; Chicago C. R. Co. v. Mead, 206 Ill. 178; East St. Louis Connecting Co. v. Enright, 152 Ill. 246, 38 N. E. 553; Cleveland, C. C. & St. L. R. Co. v. Monaghan, 140 Ill. 474, 479, 30 N. E. 869; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Western C. & M. Co. v. Ingraham, 70 Fed. 219; St. Louis S. & W. R. Co. v. Ferguson (Tex. Cv. App. 64 S. W. 797; Lyon v. Watson, 109 Mich. 390, 67 N. W. 512; Meyer v. Southern R. Co. (Mo.) 36 S. W. 367; Hamilton v. Great F. St. R. Co. 17 Mont. 334, 42 Pac. 860; Ritzman v. P. 110 Ill. 362, 372; Fessenden v. Doane, 188 Ill. 228, 58 N. E. 974; Stein v. Vannice, 44 Neb. 132, 62 N. W. 464; Durham v. Goodwin, 54 Ill. 469, 471; Smalls v. S. 105 Ga. 669, 31 S. E. 571; Northern P. R. Co. v. Lynch, 79 Fed. 268; Texas &c. R. Co. v. McCoy, 90 Tex. 264, 38 S. W. 36; Grant v. Roberts (Tex. Cv. App.) 38 S. W. 650; P. v. Armstrong, 114 Cal. 570, 46 Pac. 611; S. v. Riney, 137 Mo. 102, 38 S. W. 718 (alibi and possession of stolen goods); Board of Comrs. v. Nichols, 139 Ind. 611, 38 N. E. 526; North Chicago St. R. Co. v. Boyd, 156 Ill. 416, 40 N. E. 955; Greenwood v. Davis, 106 Mich. 230, 64 N. W. 26; Masonic, &c., Asso. v. Collins, 210 Ill. 482, 486.

[105] Sandell v. Sherman, 107 Cal. 391, 40 Pac. 493; Gray v. S. 42 Fla. 174, 28 So. 53; S. v. Lee, 58 S. Car. 335, 36 S. E. 706; Spears v. S. (Tex. Cr. App.), 56 S. W. 347; Howard v. P. 185 Ill. 552, 57 N. E. 441; S. v. Cocoran, 7 Idaho, 220, 61 Pac. 1034; P. v. Burgle, 123 Cal. 303, 55 Pac. 998; Joiner v. S. 105 Ga. 646, 31 S. E. 556; Ballou v. Young, 42 S. Car. 170, 20 S. E. 84; Hughes Cr. Law, § 3261. citing: Bonardo v. P. 182 Ill. 418, 55 N. E. 519; Kennedy v. S. 107 Ind. 144, 6 N. E. 305, 7 Am. Cr. R. 426; Boykin v. P. 22 Colo. 496, 45 Pac. 419; S. v. McCoy, 15 Utah, 136, 49 Pac. 420; Thrawley v. S. 153 Ind. 375, 55 N. E. 95; Williams v. S. (Tex. Cr. App.), 55 S. W. 500; Small v. S. 105 Ga. 669, 31 S. E. 571; Kerr-Mur-

for complaint of the giving of an instruction which ignores the facts tending to establish the defense, where it appears that the instructions given for the defendant fully cover the theory of the defense.[106] So where an instruction may be faulty in that it conveys the impression that if either of two persons who are on trial is guilty both should be convicted, yet where by other instructions the court states that the guilt of one would not necessarily warrant a conviction of the others there is no substantial error; the instructions being considered as a whole, the error is harmless.[107]

§ 72. If instructions be harmonious, defects are harmless.—If all the instructions considered together are harmonious and consistent, and cover all the material issues involved in the case, then the charge is sufficient, notwithstanding a single instruction standing alone may not correctly or fully state the law.[108] So if an instruction be faulty in that it requires a greater de-

phy Mfg. Co. v. Hess, 98 Fed. 56; Standard Life & Accident Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49; Miller v. Stevens, 23 Ind. App. 365, 55 N. E. 262; Green v. Eden, 24 Ind. App. 583, 56 N. E. 240; Krause v. Plumb, 195 Pa. St. 65, 45 Atl. 648; City of Louisville v. McGill (Ky.), 52 S. W. 1053; Thomas v. Gates, 126 Cal. 1, 58 Pac. 315; Walrod v. Webster County, 110 Iowa, 349, 81 N. W. 598, 47 L. R. A. 480; Chicago, R. I. & P. R. Co. v. Zerneeke, 59 Neb. 689, 82 N. W. 26; Ohio & I. Torpedo Co. v. Fishburn, 61 Ohio St. 608, 56 N. E. 457; Bowman v. Bowman, 153 Ind. 498, 55 N. E. 422; Missouri, K. & T. R. Co. v. Lyons (Tex. Cv. App.) 58 S. W. 96; Toplitz v. Bauer, 161 N. Y. 325, 56 N. E. 1059; Kimball v. Borden, 97 Va. 477, 34 S. E. 45; Kleiner v. Third Ave. R. Co. 162 N. Y. 193, 56 N. E. 497; Stroud v. Smith, 194 Pa. St. 502, 45 Atl. 329; Warfield v. Louisville & N. R. Co. 104 Tenn. 74, 55 S. W. 304; Hockaday v. Wartham, 22 Tex. Cv. App. 419, 54 S. W. 1094; S. v. Darrough, 152 Mo. 522, 54 S. W. 226; Edwards v. P. 26 Colo. 539, 59 Pac. 56; Burns v. Woolery, 15 Wash. 134, 45 Pac. 894; Williams v. S. (Tex. Cr. App.), 55 S. W. 500 Keesier v. S. 154 Ind. 242, 56 N. E. 232; P. v. Anderson, 105 Cal. 32, 38 Pac. 513; Smith v. Meyers (Neb.), 71 N. W. 1006; Benham v. Taylor, 66 Mo. App. 308; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; Crenshaw v. Johnson, 120 N. Car. 270, 26 S. E. 810; P. v. Ross, 115 Cal. 233, 46 Pac. 1059; S. v. Urie, 101 Iowa, 411, 70 N. W. 603; Bell v. Martin (Tex. Cv. App.), 28 S. W. 108; Barr v. S. (Miss.), 21 So. 131; Northern P. R. Co. v. Poirier, 67 Fed. 881; Butler v. Machen, 65 Fed. 901; Housh v. S. 43 Neb. 163, 61 N. W. 571; Hollins v. Gorham, 23 Ky. L. R. 2185, 66 S. W. 823; Coffin v. U. S. 162 U. S. 664, 16 Sup Ct. 943; McFaul v. Madero F. & F. C. 134 Cal. 313, 66 Pac. 308; Debney v. S. 45 Neb. 856, 64 N. W. 446; Mulvihill v. Thompson, 114 Iowa, 734, 87 N. W. 693; Terre Haute & I. R. Co. v. Rittenhouse, 28 Ind. App. 633, 62 N. E. 295.

[106] Meadows v. Pacific M. L. Ins. Co. 129 Mo. 76, 31 S. W. 578.

[107] Baker v. S. 17 Ga. 452, 25 S. E. 341.

[108] Shaw v. Missouri & K. D. Co. 56 Mo. App. 521.

gree of care than the law calls for, the error is not material when the instructions, considered as a whole advise the jury as to the degree of care the law requires.[109] Or where an instruction, standing alone, omits to state that the burden of proof is on the plaintiff to prove an essential element of his case there is no material error when other instructions clearly state that the burden of proof is on the plaintiff.[110] Or where an instruction as to the burden of proof is obscure the error is immaterial where others given on the same subject clearly state the law.[111] There can be no ground for complaint that an instruction assumes the existence of a material fact where it appears from the whole evidence that the jury must have understood that such fact must be established by the evidence.[112]

§ 73. Grouping instructions into one series.—The court in charging the jury may group the instructions asked by both parties by arranging them on each particular subject, and read them together as one series.[113] The order in which the instructions are arranged, in charging the jury, is discretionary with the court; and the fact that they may not be logically arranged cannot ordinarily be urged as error in the absence of prejudicial error.[114]

§ 74. Words, phrases and clauses.—The term "difficulty," when used in drawing instructions, is well understood by all persons. It is of constant application in legal proceedings, and is expressive of a group or collection of ideas that cannot, perhaps, be imparted so well by any other term. Its use, therefore, avoids a great deal of circumlocution which generally leads to confusion and misapprehension.[115]

The word "while" used in an instruction relating to an injury alleged to have been sustained through the negligence of the defendant while the plaintiff was in the exercise of or-

[109] San Antonio St. R. Co. v. Watzlavzick (Tex. Cv. App.), 28 S. W. 115.

[110] Crutcher v. Sechick, 10 Tex. Cv. App. 676, 32 S. W. 75.

[111] Bingham v. Hartley, 44 Neb. 682, 62 N. W. 1089.

[112] City of Atlanta v. Young, 93 Ga. 265, 20 S. E. 317.

[113] Young v. P. 193 Ill. 236, 239, 61 N. E. 1104; Crowell v. P. 190 Ill. 508, 519, 60 N. E. 872; Bonardo v. P. 182 Ill. 411, 55 N. E. 579.

[114] Atchison, T. & S. F. R. Co. v. Calvert, 52 Kas. 547, 34 Pac. 976; Gulf, C. & S. F. R. Co. v. Dunlap (Tex. Cv. App.), 26 S. W. 655.

[115] Gainey v. P. 97 Ill. 270, 279.

dinary care does not mean at the particular point of time when the injury was received; it relates to the entire transaction in question.[116] Also the words "at the time" when used in drawing instructions refer to the whole transaction.[117] The employment of the word "purported" in drawing instructions in a will contest is not improper in referring to the will as the "purported will;" it is more accurate than "the will." And to say the "pretended will" is not objectionable.[118]

An instruction defining ordinary care to be "such care as a person of ordinary prudence and skill would usually exercise under the circumstances" is not improper.[119] The expressions "due care," "ordinary care" "and reasonable care" are convertible terms and mean in the same degree; so that if in a series of instructions these different terms are used in different instructions there is no error.[120] The use of the words "punitive damages" in an instruction, instead of "exemplary damages," is not error. They are synonymous terms.[121]

§ 75. Definition of terms.—The term "prima facie" used in an instruction in referring to the evidence is as well understood as a large share of the words employed, and requires no explanation; it is recognized as an English term.[122] Using the words "ratification," "acquiescense" and "repudiation" in the giving of instructions without defining them is not error.[123] Nor

[116] Chicago & A. R. Co. v. Fisher, 141 Ill. 625, 31 N. E. 406. See North Chicago St. R. Co. v. Cossar, 203 Ill. 608, 613, 68 N. E. 88 (instruction improper); St. Louis N. Stock Yards v. Godfrey, 198 Ill. 288, 294, 65 N. E. 90.

[117] McNulta v. Lockridge, 137 Ill. 288, 27 N. E. 452; Lake Shore & M. S. R. Co. v. Johnson, 135 Ill. 653, 26 N. E. 510; Lake Shore & M. S. R. Co. v. Parker, 131 Ill. 566, 23 N. E. 237.

[118] Egbers v. Egbers, 177 Ill. 82, 90, 52 N. E. 285; Smith v. Henline, 174 Ill. 184, 200, 51 N. E. 227; Keithley v. Stafford, 126 Ill. 507, 521, 18 N. E. 740; Campbell v. Campbell, 138 Ill. 612, 28 N. E. 1080.

[119] Chase v. Blodgett Milling Co. 111 Wis. 655, 87 N. W. 826; Yerkes v. Northern P. R. Co. 112 Wis. 184, 88 N. W. 33 (ordinary care not correctly defined).

[120] Baltimore & O. R. Co. v. Faith, 175 Ill. 58, 51 N. E. 807; Chicago, B. & Q. R. Co. v. Yortz, 158 Ill. 321, 42 N. E. 64; Illinois Cent. R. Co. v. Noble, 142 Ill. 584, 32 N. E. 684; Schmidt v. Sinnatt, 103 Ill. 160, 164; Louisville & N. R. Co. v. Pointer's Adm'r (Ky.), 69 S. W. 1108.

[121] Roth v. Eppy, 80 Ill. 283, 287.

[122] Chicago & A. R. Co. v. Esten, 178 Ill. 198, 52 N. E. 954; Louisville, E. & St. L. C. R. Co. v. Spencer, 149 Ill. 103, 36 N. E. 91.

[123] Iowa State Sav. Bank v. Black, 91 Iowa, 490, 59 N. W. 283.

is it necessary to define the term negligence when used in an instruction.[124]

The word "carelessly" used in an instruction as to knowingly and carelessly permitting stock to injure trees, need not be defined.[125] Nor need the word "contributed" be defined when used in an instruction.[126] It is not necessary to define the words "fraud," "preponderance" and "presumption" when using them in instructions.[127]

The words "felonious" and "feloniously," when used in instructions, need not be defined.[128] But on the other hand, it has been held that the word felonious should be explained. "To charge a jury of even more than average intelligence, but who are unlearned in the law, that one who acted under the fears of a reasonable man that a felony was about to be committed on him by another would be justified in taking the life of such person without explaining what is meant by the term 'felony,' leaves the jury almost, if not entirely, in the dark as to what is necessary to constitute a defense in such a case." In all cases where the term "felony" or other technical term of the law is contained in the statute the meaning should be explained to the jury.[129] Nor need the words "falsely" and "fraudulently" be defined when used in instructions.[130]

The court is not required to instruct as to the meaning of a particular word used in the indictment in describing the offense which may be eliminated as mere surplusage, such, for instance, as the word "feloniously" under a statute for wilfully shooting" at another.[131] The words "cool," "sedate" and "deliberate" used in an instruction need not be defined. They should be received in their usual and ordinary acceptation.[132] In a homicide case the giving of an instruction containing the

[124] American Cotton Co. v. Smith (Tex. Cv. App.), 69 S. W. 443.

[125] Warden v. Henry, 117 Mo. 530, 23 S. W. 776.

[126] Bunyan v. Loftus, 90 Iowa, 122, 51 N. W. 685.

[127] Kischman v. Scott, 166 Mo. 214, 65 S. W. 1031.

[128] S. v. Barton, 142 Mo. 450, 44 S. W. 239; S. v. Weber, 156 Mo. 249, 56 S. W. 729; S. v. Penney, 113 Iowa, 691, 84 N. W. 509.

[129] Roberts v. S. 114 Ga. 450, 40 S. E. 297. See Cobb v. Covenant M. B. Asso. 153 Mass. 176, 26 N. E. 230.

[130] S. v. Gregory, 170 Mo. 598, 71 S. W. 170.

[131] S. v. Beck, 46 La. 1419, 16 So. 368.

[132] Beard v. S. (Tex. Cr. App.), 53 S. W. 348.

words in the "heat of passion," without defining that expression is erroneous.[133]

"Malice aforethought" need not be defined where malice and express malice have been properly defined in the same charge.[134] So instructions containing the words "deliberation" and "premeditation" are improper without defining these terms.[135] The use of the words "deadly violence" to the person instead of "great violence" is not error where it clearly appears from the charge that the one expression was used in the sense of the other.[136] Nor is it necessary to define the term "great bodily injury" when used in an instruction.[137] On a burglary charge in the night time the failure of the court to define the term "night time" in giving instructions cannot be complained of as error in the absence of a request to define the term.[138]

§ 76. Definition of terms—Continued.—The use of the term "fellow servant" in charging the jury without defining it is erroneous. The definition of fellow servant is a question of law. But when an instruction correctly defines the meaning of this term it is then a question of fact for the jury to determine, whether the person alleged to be a fellow servant comes within the definition of the term.[139] Or reading to the jury the statute defining fellow servant without any explanation, is error.[140] An instruction relating to master and servant, which states that the servant does not assume those "risks due to the master," was held not objectionable on the ground that these words are too indefinite in their meaning.[141] The court need not define the term "common laborer" in giving instructions.[142]

[133] S. v. Strong, 153 Mo. 548, 55 S. W. 78; S. v. Reed, 154 Mo. 122, 55 S. W. 278.

[134] Hatcher v. S. (Tex. Cr. App.), 65 S. W. 97.

[135] S. v. Foster, 130 N. Car. 666, 41 S. E. 284.

[136] Acers v. U. S. 164 U. S. 388, 17 S. Ct. 91.

[137] S. v. Bone, 114 Iowa, 537, 87 N. W. 507, 55 L. R A. 378.

[138] Shaffel v. S. 97 Wis. 377, 72 N. W. 888.

[139] Whitney & Starrette Co. v. O'Rourke, 172 Ill. 186, 50 N. E. 242.

[140] Kansas City, Ft. S. & M. R. Co. v. Becker, 63 Ark. 477, 39 S. W. 358.

[141] Eastman v. Curtis, 67 Vt. 432, 32 Atl. 232. See also Pittsburg Bridge Co. v. Walker, 170 Ill. 550, 554, 48 N. E. 915; Chicago & E. I. R. Co. v. Kneirim, 152 Ill. 458, 466, 39 N. E. 324.

[142] Boeltger v. Scherpe & Koken A. & I. Co. 136 Mo. 531, 38 S. W. 298. An instruction using the expression "respondeat superior," without explanation, is improper, Chicago, &c. R. Co. v. White, 209 Ill. 124, 132. See Kehl v. Abram, 210 Ill. 218 (material inducements).

§ 77. **Ungrammatical and awkwardly arranged.**—The fact that an instruction is ungrammatical and awkward in its phraseology does not render it erroneous if it is clear in its meaning.[143] An instruction which states that a certain presumption "may be overcome by any evidence that satisfies your minds to the contrary," instead of stating that such presumption "may be overcome by evidence to the contrary which satisfies your minds" is not material error.[144]

§ 78. **Misuse of names, terms, etc.—Effect.**—The use of the word "plaintiff," instead of "defendant," in an instruction is not harmful error where it is clear from the instruction that it corrects itself;[145] or where the context plainly shows which of the two words was intended to be used;[146] or the use of the word "prisoner" for defendant is not material error.[147] The use by mistake of the word "acquit," instead of "convict," in framing an instruction, renders it erroneous. Thus, when the court instructs that if the jury find that the prosecution has proven all the essential facts necessary to establish guilt they should "acquit" it is error.[148]

The improper use of the word "testimony," instead of "evidence," in drawing instructions is not material error.[149] Nor is it objectionable to make use of the word "will," instead of "may," in directing the jury that if they find from the evidence that the plaintiff is entitled to recover damages they "will" determine the amount to which he is entitled.[150] The word "must" should not be improperly used for the word "may" in the giving of instructions. If the jury believe a witness has wilfully testified falsely as to any material fact in issue they may disregard the testimony of such witness, but they are not bound

[143] Langdon v. Winterstein, 58 Neb. 278, 78 N. W. 501.

[144] Rule v. Bolles, 27 Ore. 368, 41 Pac. 691.

[145] McKinzie v. Remington, 79 Ill. 388; Nichols v. Mercer, 44 Ill. 250.

[146] Central Texas & N. W. R. Co. v. Bush, 12 Tex. Cv. App. 291, 34 S. W. 133; Flam v. Lee, 116 Iowa, 289, 90 N. W. 70; Pittman v. Weeks, 132 N. Car. 81, 43 S. E. 582; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. 269.

[147] Dinsmore v. S. 61 Neb. 418, 85 N. W. 445.

[148] Cummins v. S. 50 Neb. 274, 69 N. W. 756.

[149] P. v. Hubert, 119 Cal. 216, 51 Pac. 329; Padgett v. Jacobs, 128 Mich. 632, 87 N. W. 898.

[150] North Chicago St. R. Co. v. Zeigler, 182 Ill. 13, 54 N. E. 1006; Kane v. Footh, 70 Ill. 590 ("may" or "shall"); Chicago & E. R. Co. v. Meech, 163 Ill. 305, 315, 45 N. E. 290.

to do so.[151] The word "ought" used in an instruction means, in its ordinary sense, to be held or bound in duty or moral obligation.[152]

§ 79. Words omitted from instructions.—The omission of a word will sometimes render an instruction erroneous.[153]

[151] Hoge v. P. 117 Ill. 46, 6 N. E. 796.

[152] Otmer v. P. 76 Ill. 152.

[153] Carleton Min. & Mill. Co. v. Ryan, 29 Colo. 401, 68 Pac. 279 ("not" omitted); McCormick v. S. (Neb.) 92 N. W. 606 ("and" omitted between fairly and truthfully is not error); Southwestern T. & T. Co. v. Newman (Tex. Cv. App.), 34 S. W. 661 (inadvertent use of "not" is error).

CHAPTER III.

BASED ON EVIDENCE AND PLEADINGS.

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§ 80. **Supported by evidence.**—One of the familiar rules to be observed in charging the jury is that the instructions must

be based upon evidence; for if there is no evidence adduced tending to prove a material fact, or state of facts in issue, the giving of instructions as to such facts is improper.[1] And this rule ap-

[1] Entivistle v. Meikle,, 180 Ill. 28, 54 N. E. 217; Lusk v. Throop, 189 Ill. 127, 142, 59 N. E. 529; Baxter v. Campbell (S. Dak.), 97 N. W. 368; Glucose Sugar R. Co. v. Flinn, 184 Ill. 128, 56 N. E. 400; American Strawboard Co. v. Chicago & A. R. Co. 177 Ill. 513, 53 N. E. 97; Sugar Creek Mining Co. v. Peterson, 177 Ill. 329, 52 N. E. 475; Doyle v. P. 147 Ill. 398, 35 N. E. 372; Moore v. Barker' Asphalt Paving Co. 118 Ala. 563, 23 So. 798; Birr v. P. 113 Ill. 648; Rice v. P. 38 Ill. 436; S. v. Hicks (Mo.), 77 S. W. 542; Romine v. San Antonio Tr. Co. (Tex. Cv. App.), 77 S. W. 35; Denison & P. S. R. Co. v. O'Maley (Tex. Cr. App.), 45 S. W. 225; Wadsworth v. Dunman, 117 Ala. 661, 23 So. 699; Plumb v. Campbell, 129 Ill. 109, 18 N. E. 790; Chicago, R. I. & P. Co. v. Lewis, 109 Ill. 125; Farlow v. Town, &c. 186 Ill. 256, 57 N. E. 781; Murphy v. Farlow, 124 Ala. 279, 27 So. 442; Central of Ga. R. Co. v. Windham, 126 Ala. 552, 28 So. 392; Rock I. & E. I. R. Co. v. Gordon, 184 Ill. 456, 56 N. E. 810; Williams v. Andrew, 185 Ill. 98, 56 N. E. 1041; Hersey v. Hutchins, 70 N. H. 130, 46 Atl. 33; Bennett v. McDonald, 60 Neb. 47, 80 N. W. 110; Einseidler v. Whitman Co. 22 Wash. 388, 60 Pac. 1122; Washington Co. W. Works v. Garver, 91 Md. 398, 46 Atl. 979; Steiner v. Jeffries, 118 Ala. 573, 24 So. 37; Burke v. Sanitary Dist. 152 Ill. 134, 38 N. E. 670; Hubuer v. Friege, 90 Ill. 212; Frost v. Foote (Tex. Cv. App.), 44 S. W. 1071; Frantz v. Rose, 89 Ill. 594; Howe S. M. Co. v. Layman, 88 Ill. 39; Bank of M. v. Page, 98 Ill. 125; Yeomans v. v. Page, 98 Ill. App. 228 (error); Parker v. National M. B. & L. Asso. (W. Va.), 46 S. E. 811; S. v. DeWolfe (Mont.), 74 Pac. 1086; Krish v. Ford, 19 Ky. L. R. 1167, 43 S. W. 237; Selleck v. Selleck, 107 Ill. 396; S. v. Petsch, 43 S. Car. 132, 20 S. E. 993; Truslow v. S. 95 Tenn. 189, 31 S. W. 987; American T. & T. Co. v. Kersh (Tex. Cv. App.), 66 S. W. 74; Jones v. Collins, 94 Md. 403, 51 Atl. 398; Walter v. Victor G. Bloede Co. 90 Md. 80, 50 Atl. 433; Butterfield v. Kirtley, 114 Iowa, 520, 87 N. W. 407; Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500; Griswold v. Town of Guilford, 75 Conn. 192, 52 Atl. 742; Ward v. S. 102 Ga. 531, 28 S. E. 982; Wiggins v. S. 103 Ga. 559, 29 S. E. 26; Smith v. S. 75 Miss. 542, 23 So. 260; Dyal v. S. 103 Ga. 425, 30 S. E. 254; Patterson v. S. 75 Miss. 670, 23 So. 647; Herrick v. Gary, 83 Ill. 86; Lehman v. Press, 106 Iowa, 389, 76 N. W. 818; Braley v. Powers, 92 Me. 203, 42 Atl. 362; Hughie v. Hammett, 105 Ga. 368, 31 S. E. 109; Shiverick v. R. J. Gunning Co. 58 Neb. 29, 78 N. W. 460; Nofsinger v. Goldman, 122 Cal. 609, 55 Pac. 425; Western U. Tel. Co. v. Waller (Tex. Cv. App.), 47 S. W. 396; Oliver v. Ohio River R. Co. 42 W. Va. 703, 26 S. E. 444; Nite v. S. (Tex. Cr. App.), 54 S. W. 763; Griffin v. S. (Tex. Cr. App.), 53 S. W. 848; Boone v. Ritchie (Ky.) 53 S. W. 518; Howard v. Schwartz (Tex. Cv. App.), 55 S. W. 348; Dolphin v. Plumley, 175 Mass. 304, 56 N. E. 281; Wallace v. Curtis, 36 Ill. 156, 160; Hodgen v. Latham, 33 Ill. 344, 349; New England F. & M. Ins. Co. v. Wetmore, 32 Ill. 221, 249; Lawrence v. Jarvis, 32 Ill. 304, 312; Pfund v. Zimmerman, 29 Ill. 269; Baltimore & O. R. Co. v. Feev's Ex'r, 94 Va. 82, 26 S. E. 406; Kelly v. S. 51 Neb. 572, 71 N. W. 299; Edwards v. S. (Tex. Cr. App.), 38 S. W. 779; West Chicago St. R. Co. v. Petters, 196 Ill. 298, 63 N. E. 662; Louisville & N. R. Co. v. Baker, 106 Ala. 624, 17 So. 452; Lucia v. Meech, 68 Vt. 175, 34 Atl. 695; Hodo v. Mexican N. R. Co. (Tex. Cv. App.), 31 S. W. 708; Wheeler v. S. 76 Miss. 265, 24 So.

plies to any feature or element of a case. So if the evidence is wanting on any material fact, an instruction submitting such fact to the jury is improper, and should be refused.[2] And, gener-

310; Caledonian Ins. Co. v. Traul, 80 Md. 214, 30 Atl. 904; Fletcher v. Post, 104 Mich. 424, 62 N. W. 574; Ashworth v. East Tenn. V. & G. R. Co. 94 Ga. 715, 20 S. E. 424; Irby v. S. 95 Ga. 467, 20 S. E. 218 (confession); Mittwer v. Stremel, 69 Minn. 19, 71 N. W. 698; Hart v. S. 93 Ga. 160, 18 S. E. 550 (good character); Stevens v. Walton (Colo. App.), 68 Pac. 834; Norfolk R. & L. Co. v. Corletto, 100 Va. 355, 41 S. E. 740; Crete M. Fire Ins. Co. v. Patz, 64 Neb. 676, 90 N. W. 546; Texas T. & L. Co. v. Gevin (Tex. Cv. App.), 68 S. W. 721, 67 S. W. 892; Chesapeake & O. R. Co. v. Rogers' Adm'x, 100 Va. 324, 41 S. E. 732; Illinois Steel Co. v. McFadden, 196 Ill. 344, 98 Ill. App. 296, 63 N. E. 671; Ficken v. City of Atlanta, 114 Ga. 970, 41 S. E. 58; Gulf, C. S. & F. R. Co. v. Moore (Tex. Cv. App.), 68 S. W. 559; Hicks v. Southern R. Co. 63 S. Car. 559, 41 S. E. 753; Skow v. Locks (Neb.) 91 N. W. 204; Downey v. Gernini Min. Co. 24 Utah, 431, 68 Pac. 414; Walton v. S. 114 Ga. 112, 39 S. E. 877; P. v. Ward, 134 Cal. 301, 66 Pac. 372; Jacobi v. S. 133 Ala. 1, 32 So. 158; Jones v. Wattles (Neb.), 92 N. W. 765; Cartiledge v. S. 132 Ala. 17, 31 So. 553; Lyman v. P. 198 Ill. 544, 64 N. E. 974; S. v. Sheppard, 49 W. Va. 582, 39 S. E. 676; McEldon v. Patton (Neb.), 93 N. W. 938; Braxton v. S. 157 Ind. 213, 61 N. E. 195; Barnett v. Fearig, 101 Ind. 96; Rhea v. S. 63 Neb. 461, 88 N. W. 789; Clem v. S. 31 Ind. 480; Moore v. S. 114 Ga. 256, 40 S. E. 295; S. v. Northway, 164 Mo. 513, 65 S. W. 331; Green v. S. 43 Fla. 556, 30 So. 656; Terry v. S. (Tex. Cr. App.), 66 S. W. 451; P. v. Ross, 134 Cal. 256, 66 Pac. 229; Allen v. Fuller, 182 Mass. 202, 65 N. E. 31; Broyhill v. Norton, 175 Mo. 190, 74 S. W. 1024; Prentice Co. v. Page, 164 Mass. 276, 41 N. E. 279; Davis v. Bingham (Tex. Cv. App.) 33 S. W. 1035; Zimmerman v. Knox, 34 Kas. 245, 8 Pac. 104.

[2] Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997; Gilbertson v. Forty-Second St. M. & St. N. Ave. R. Co. 43 N. Y. S. 782, 14 App. Div. 294; Chicago, K. & W. R. Co. v. Prouty, 55 Kas. 503, 40 Pac. 909; Galveston, H. & S. A. R. Co. v. Waldo (Tex. Cv. App.) 26 S. W. 1004; Wisdom v. Reeves, 110 Ala. 418, 18 So. 13; Hasson v. Klee, 168 Pa. St. 510, 32 Atl. 46; S. v. Hertzog (W. Va.), 46 S. E. 796; Joines v. Johnson, 133 N. Car. 487, 45 S. E. 828; Towle v. Stimpson Mill Co. (Wash.), 74 Pac. 471; Wildman v. S. (Ala.) 35 So. 995; Spraggins v. S. (Ala.) 35 So. 1003; Honick v. Metropolitan St. R. Co. 66 Kas. 124, 71 Pac. 265; Winter v. Supreme Lodge K. P. 101 Mo. App. 550, 73 S. W. 877 (suicide); Fritz v. Western U. Tel. Co. 25 Utah, 263, 71 Pac. 209; S. v. Bartley, 56 Neb. 810, 77 N. W. 438; Union P. R. Co. v. Ruzika (Neb.), 91 N. W. 543; Hunt v. Searcy, 167 Mo. 158, 67 S. W. 206; Parker v. Wells (Neb.), 94 N. W. 717; St. Louis, &c. R. Co. v. Philpot (Ark.), 77 S. W. 901; Bullard v. Brewer (Ga.), 45 S. E. 711; Bullard v. Smith (Mont.), 72 Pac. 761; Denver, &c. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688; Scott v. Boyd (Va.), 42 S. E. 918; Williams v. Avery, 131 N. Car. 188, 42 S. E. 582; Burton v. Rosemary Mfg. Co. 132 N. Car. 17, 43 S. E. 480; Crossette v. Jordan (Mich.), 92 N. W. 782; Aldous v. Olverson (S. Dak.), 95 N. W. 917; Central City v. Engle (Neb.), 91 N. W. 849; McDonald v. McDonald, 94 Ga. 675, 20 S. E. 5; Morton v. Gately, 2 Ill. (1 Scam.) 210; Davis v. Searey, 79 Miss. 292, 30 So. 823 (fraud); Harrington v. Claplin (Tex. Cv. App.), 66 S. W. 898 (fraud); Challis v. Lake, 71 N. H.

ally speaking, the giving of instructions reciting matters of fact of a prejudicial character unsupported by any evidence whatever, is material error.[3]

90, 51 Atl. 260; Mitchell v. Potomac Ins. Co. 183 U. S. 42, 22 Sup. Ct. 22; Staats v. Byers, 73 N. Y. S. 893, 68 App. Div. 634.

[3] Redding v. Redding Estate, 69 Vt. 500, 38 Atl. 230; Hansberg v. P. 120 Ill. 21, 11 N. E. 526; Green v. Willingham, 100 Ga. 224, 28 S. E. 42; Birr v. P. 113 Ill. 649; Knight v. Overman Wheel Co. 174 Mass. 455, 54 N. E. 890; Chicago & A. R. Co. v. Bragonier, 119 Ill. 51, 61, 7 N. E. 688; Mohrenstecher v. Westervelt, 87 Fed. 157; Cannon v. P. 141 Ill. 283, 36 N. E. 1027; Montag v. P. 141 Ill. 80, 30 N. E. 337; Belk v. P. 125 Ill. 584, 17 N. E. 714; Healy v. P. 163 Ill. 383, 45 N. E. 230; Wallace v. S. 41 Fla. 547, 26 So. 713; Echols v. S. (Ga.) 46 S. E. 409; Rooks v. S. (Ga.) 46 S. E. 631; Johnson v. Com. (Va.) 46 S. E. 790; S. v. St. John, 94 Mo. App. 229, 68 S. W. 374; Scott v. Boyd (Va.), 42 S. E. 918; Spradley v. S. 80 Miss. 82, 31 So. 534; Chrisholm v. Keyfauver, 110 Cal. 102, 42 Pac. 424; International & G. N. R. Co. v. Eason (Tex. Cv. App.) 35 S. W. 208; Martin v. Union M. L. Ins. Co. 13 Wash. 275, 43 Pac. 53; Thomas v. S. 126 Ala. 4, 28 So. 591; Mahan v. Com. (Ky.) 56 S. W. 529; S. v. Swallum, 111 Iowa, 37, 82 N. W. 439; Suddeth v. S. 112 Ga. 407, 37 S. E. 747; P. v. Kelly, 133 Cal. 1, 64 Pac. 1091; Rosenkrans v. Barker, 115 Ill. 336, 3 N. E. 93; Gordon v. Alexander, 122 Mich. 107, 80 N. W. 978; Conner v. Metropolitan Life Ins. Co. 78 Mo. App. 131; Archer v. U. S. 9 Okla. 569, 60 Pac. 268; Tully v. Excelsior Iron Works, 115 Ill. 544, 549, 5 N. E. 83; Chicago, B. & Q. R. Co. v. Bundy, 210 Ill. 49; Boone v. P. 148 Ill. 440, 451, 36 N. E. 99; In re Stickney's Will, 104 Wis. 581, 80 N. W. 921; Denver & R. G. R. Co. v. Spencer, 25 Colo. 9, 52 Pac. 211; Com. v. Reid, 175 Mass. 325, 56 N. E. 617; Arismendis v. S. (Tex. Cr. App.), 54 S. W. 599; P. v. Matthews, 126 Cal. 17, 58 Pac. 371; S. v. Callaway, 154 Mo. 91, 55 S. W. 444; Haggarty v. Strong, 10 S. Dak. 585, 74 N. W. 1037; Gandy v. Orient Ins. Co. 52 S. Car. 224, 29 S. E. 655; Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126, 132; Terrell v. Russell (Tex. Cv. App.), 42 S. W. 129; Fore v. S. 75 Miss. 727, 23 So. 710; Brin v. McGregor (Tex. Cv. App.) 45 S. W. 923; S. v. Robinson, 52 La. Ann. 616, 27 So. 124; S. v. Vaughan, 141 Mo. 514, 42 S. W. 1080; Toledo, W. & W. R. Co. v. Ingraham, 77 Ill. 313; Frame v. Badger, 79 Ill. 441, 446; Nichols v. Bradley, 78 Ill. 44; Plumner v. Rigdon, 78 Ill. 222; Straus v. Minzesheeiner, 78 Ill. 497; Andreas v. Ketcham, 77 Ill. 380; North Chicago St. R. Co. v. Irwin, 202 Ill. 345, 356, 66 N. E. 1077; City of Chicago v. Sholten, 75 Ill. 468; Roach v. P. 77 Ill. 29; Toledo, P. & W. R. Co. v. Patterson, 63 Ill. 306; Paulin v. Howser, 63 Ill. 312; Albrecht v. Walker, 73 Ill. 73; St. Louis, I. M. & S. R. Co. v. Woodward, 70 Ark. 441, 65 S. W. 55; S. v. Valle, 164 Mo. 539, 65 S. W. 232; Stevens v. Metzger, 95 Mo. App. 609, 69 S. W. 625; P. v. Mendenhall, 135 Cal. 344, 67 Pac. 325, (intoxicating liquor); Johnson v. S. 36 Ark. 242; Eggett v. Allen, 106 Wis. 633, 82 N. W. 556; Hot Springs R. Co. v. Williamson, 136 U. S. 121, 10 Sup. Ct. 955; Northern C. R. Co. v. Husson, 101 Pa. St. 7; Lurssen v. Lloyd, 76 Md. 360, 25 Atl. 294; Simpson v. Post, 40 Conn, 321; S. v. Labuzan, 37 La. Ann. 489; Thompson v. Anderson, 86 Iowa, 703, 53 N. W. 418; Penobscot R. Co. v. White, 41 Me. 512; Layton v. S. 56 Miss. 791; S. v. Parker, 13 Lea (Tenn.) 221; Shaughnessey v. Sewell & D. C. Co. 160 Mass. 331, 35 N. E. 861; Consolidated Tr. Co. v. Haight, 59 N. J. L. 577, 37 Atl. 135; Harrison

§ 81. Supported by evidence—Illustrations.—Thus in an action for malicious prosecution an instruction that probable cause cannot exist when good faith is lacking, is erroneous, if there is no evidence that the defendant acted in bad faith.[4] In an action of trespass where there is no evidence tending to prove wilful or wanton conduct on the part of persons in charge of a train in expelling a passenger therefrom, an instruction submitting the issue of wilfulness or wantonness in estimating the amount of damages is erroneous.[5] Or where there is no evidence to show that an injury complained of was the result of wilfulness or wantonness, it is improper to instruct on that question.[6]

The giving of an instruction on the question as to whether the conductor maliciously ejected the plaintiff from the car of the defendant, is prejudicial, where there is no evidence whatever tending to support it.[7] Also where there is no evidence tending to show undue influence in the making or destruction of a will, an instruction on that subject is erroneous.[8] Or the giving of an instruction as to the nature or character of undue influence sufficient to invalidate a will, is improper where there is no evidence whatever of such undue influence.[9]

An instruction directing the jury to assess the plaintiff's damages at the cash value of one half of his probable earnings during life, is erroneous where there is no evidence tending to prove

v. Baker, 15 Neb. 43, 14 N. W. 541; Crowder v. Reed, 80 Ind. 1; P. v. Devine, 95 Cal. 227, 30 Pac. 378; Zimmerman v. Knox, 34 Kas. 245, 8 Pac. 104; Ætna Ins. Co. v. Reed, 33 Ohio St. 283; Case v. Illinois Cent. R. Co. 38 Iowa, 581. See also S. v. Myer, 69 Iowa, 148, 28 N. W. 484; Hines v. Com. (Ky.) 62 S. W. 732; McMahon v. Flanders, 64 Ind. 334; Salomon v. Cress, 22 Ore. 177, 29 Pac. 439; Montgomery v. Com. (Ky.) 63 S. W. 747; Kirk v. Ter. 10 Okla. 46, 60 Pac. 797; Slingerland v. Keyser, 127 Mich. 7, 86 N. W. 390; Donald v. S. 21 Ohio C. C. 124; Jackson v. S. 91 Ga. 271, 18 S. E. 298; Moore v. Ross, 11 N. H. 547; P. v. Hong Fong, 85 Cal. 171, 24 Pac. 726; Bennett v. McDonald, 60 Neb. 47, 82 N. W. 110.

[4] Harris v. Woodford, 98 Mich. 147, 57 N. W. 96.

[5] Pennsylvania R. Co. v. Connell, 127 Ill. 419, 20 N. E. 89; Waldron v. Marcier, 82 Ill. 551; Wenger v. Calder, 78 Ill. 275.

[6] St. Louis, A. & T. H. R. Co. v. Manly, 58 Ill. 300, 304; Atchison, T. & S. F. R. Co. v. Wells, 56 Kas. 222, 42 Pac. 699 (malicious negligence).

[7] Pittsburg, Ft. W. & C. R. Co. v. Slusser, 19 Ohio St. 161.

[8] McIntosh v. Moore, 22 Tex. Cv. App. 22, 53 S. W. 611; Boone v. Richie (Ky.), 53 S. W. 518; Folks v. Folks, 107 Ky. 561, 54 S. W. 837; Calkins, Estate of, 112 Cal. 296, 44 Pac. 577.

[9] Blough v. Parry, 144 Ind. 463, 40 N. E. 70, 43 N. E. 560.

what he could earn, or what loss he had sustained in that respect.[10] So an instruction that the jury may take into consideration the expenses incurred for medical treatment, is improper and erroneous where there is no evidence showing any such expenditure or obligation incurred for such treatment.[11] And the failure to comply with certain statutory provisions in conducting a business will not warrant the giving of instructions based upon the statute if there is no evidence that such failure in any way contributed to the accident resulting in the damages complained of. The tendency of such instructions is confusing and misleading.[12]

§ 82. **Supported by evidence—Criminal cases.**—On a charge of having sexual intercourse with a female under the age of sixteen years, it appearing that the parish register of births had been changed so as to show from it that the prosecutrix was over sixteen years of age at the time of the alleged intercourse. it is improper and erroneous to submit to the jury the issue as to whether the defendant changed the register of birth, where it appears from all the evidence on that issue that the register was not altered by him, and that he had no opportunity to alter it.[13] And in a case where the evidence in a prosecution for rape strongly tends to impeach the prosecutrix, there being no evidence whatever tending to corroborate her, it is error to instruct the jury as to corroboration of the prosecuting witness.[14]

Or on a charge for maliciously destroying a fence the defendant is not entitled to an instruction charging that if the fence was on the dividing line between the premises of the prosecutor and the defendant he should be acquitted, there being no evidence that the fence was a partition fence.[15] Also an instruction as to the truth or falsity of an explanation by the defendant as to his possession of stolen goods is improper and erroneous where

[10] Alabama M. R. Co. v. Marcus, 115 Ala. 389, 22 So. 135. See Coyle v. Pittsburg, B. & L. E. R. Co. 18 Pa. Super. 235; Tuller v. City of Mt. Vernon, 171 N. Y. 247, 72 N. Y. S. 1103.

[11] Andrews v. Toledo, A. A. & N. M. R. Co. 8 Ohio C. D. 584; Alabama, G. S. & R. Co. v. Davis, 119 Ala. 572, 24 So. 862; Ft. Worth & R. G. R. Co. v. Greer (Tex. Cv. App.), 09 S. W. 421; Louisville, H. & St. L. R. Co. v. McCune (Ky.), 72 S. W. 756 (error held harmless).

[12] Coal Run Coal Co. v. Jones, 127 Ill. 382, 8 N. E. 865, 20 N. E. 89.

[13] P. v. Flaherty, 162 N. Y. 532, 57 N. E. 73.

[14] Coney v. S. 108 Ga. 773, 36 S. E. 907.

[15] Wheeler v. S. 114 Ala. 22, 21 So. 941.

there is no evidence that he gave any explanation as to how he came into possession of the goods in question.[16] It is error to give instructions on the theory of a conspiracy in the absence of any evidence tending to prove a conspiracy.[17]

§ 83. Defense unsupported by evidence.—It follows from the rule mentioned that the court in the giving of instructions is not required to recognize any defense presented by the pleadings which is unsupported by any evidence.[18] Thus in an action on a replevin bond where the defendant pleads that the goods and chattels alleged to have been taken by virtue of the writ of replevin were not the goods and chattels mentioned and described in the bond, but were other and different goods, the court in charging the jury may properly ignore the defense set up by that plea, in the absence of any evidence whatever tending to support it.[19] So in a criminal case where the defense is insanity and the evidence is entirely inadequate to establish it, the court may ignore and withdraw from the consideration of the jury such defense.[20]

§ 84. Based on incompetent evidence.—Incompetent or irrelevant evidence, though admitted without objection, will not justify the giving of instructions based thereon;[21] and, of course,

[16] Grande v. S. (Tex. Cr. App.) 38 S. W. 613.

[17] Cunningham v. P. 195 Ill. 550, 63 N. E. 517; Ter. v. Claypool (N. Mex.) 71 Pac. 463; Crane v. S. 111 Ala. 45, 20 So. 590.

[18] Kellogg v. Boyden, 126 Ill. 378, 18 N. E. 770; Town of New Windsor v. Stockdate, 95 Md. 196, 52 Atl. 596; Deatley v. Com. (Ky.) 29 S. W. 741; S. v. Morledge, 164 Mo. 522, 65 S. W. 226 (insanity); Bargna v. S. (Tex. Cr. App.) 68 S. W. 997 (on receiving stolen goods).

[19] Kellogg v. Boyden, 126 Ill. 378, 18 N. E. 770.

[20] S. v. Morledge, 164 Mo. 522, 65 S. W. 226.

[21] Eller v. Loomis, 106 Iowa, 276, 76 N. W. 686; Kohl v. S. 59 N. J. L. 445, 37 Atl. 73; Herring v. Herring, 94 Iowa, 56, 62 N. W. 666; Covington v. Simpson (Del. Super.) 52 Atl. 349; Elsworth v. Newby (Neb.), 91 N. W. 517; Provident S. L. A. Soc. v. Berger, 23 Ky. L. R. 2460, 67 S. W. 827. See Christian v. Connecticut M. L. I. Co. 143 Mo. 460, 45 S. W. 268; Crews v. Lackland, 67 Mo. 621; Dingee v. Unrue's Adm'x, 98 Va. 247, 35 S. E. 794; Coos Bay R. Co. v. Siglin, 26 Ore. 387, 38 Pac. 192; Texas, &c. R. Co. v. Durrett, 24 Tex. Cv. App. 103, 58 S. W. 187; Capital Bank v. Armstrong, 62 Mo. 65; Norfolk & West R. Co. v. Stevens, 97 Va. 631, 34 S. E. 525, 46 L. R. A. 367; Fox v. P. 95 Ill. 75. See Nye v. Kelly, 19 Wash. 73, 52 Pac. 528; Williams v. Atkinson, 152 Ind. 98, 52 N. E. 603; Illinois Cent. R. Co. v. McKee, 43 Ill. 119, 122; Kohl v. S. 57 N. J. L. 445, 37 Atl. 73; Hollins v. S. (Tex. Cr. App.) 69 S. W. 594; American Harrow Co. v. Dolvin (Ga.), 45 S. E. 983. But see Qualy v. Johnson, 80 Minn. 408, 83 N. W. 393; Collins v. Collins, 46 Iowa, 60; Central R. Co. v. Hubbard, 86 Ga.

evidence which has been excluded as incompetent will not support instructions.[22] It is not necessary to instruct the jury in reference to evidence which has been ruled out as incompetent; but if an instruction be given, directing the jury to disregard such evidence, it is harmless.[23]

The court is not required, in charging the jury, to caution them against drawing any inference from evidence which has been excluded.[24] Incompetent evidence which might have been excluded at any time during the trial may be excluded from the consideration of the jury by instructions if objection was properly made to it.[25] And the court should specifically point out to the jury by instruction what portion of the evidence is incompetent,[25*] and when thus instructed, the error in admitting such incompetent evidence will, as a general rule, be regarded as cured.[26] But, on the contrary, it has been held that any damage done to the rights of a litigant, by the admission of improper and prejudicial evidence, cannot well be remedied by the withdrawing such evidence from the consideration of the jury by

623, 12 S. E. 1020. When incompetent evidence is introduced at the instance of a party, he has no right to complain of an instruction based on such evidence, Phenix Ins. Co. v. Wilcox & G. G. Co. 65 Fed. 724.

[22] McGinnis v. Fernandes, 126 Ill. 232, 19 N. E. 44; Pease Piano Co. v. Cameron, 56 Neb. 561, 76 N. W. 1053; Mefford v. Sell (Neb.), 92 N. W. 148; Pfaffenback v. Lake S. & M. S. R. Co. 142 Ind. 246, 41 N. E. 530; Atkinson v. Gatcher, 23 Ark. 101; Hayes v. Kelley, 116 Mass. 300; New York, &c. Co. v. Fraser, 130 U. S. 611, 9 Sup. Ct. 665; Caldwell v. Stephens, 57 Mo. 589; Sheffield v. Eveleth (S. Dak.), 97 N. W. 368; Sheffield v. Eveleth (S. Dak.), 97 N. W. 367; Honingstein v. Hollingsworth, 85 N. Y. Supp. 818.

[23] Keegan v. Kinnare, 123 Ill. 290, 14 N. E. 14; Martin v. McCray, 171 Pa. St. 575, 33 Atl. 108.

[24] S. v. Gates (Wash.), 69 Pac. 385.

[25] Foxworth v. Brown, 120 Ala. 59, 24 So. 1, 41 L. R. A. 335; Stevens v. S. (Tex. Cr. App.) 49 S. W. 105; Woolsey v. Trustees of Village, 155 N. Y. 573, 50 N. E. 270; Price v. Wood, 9 N. Mex. 397, 54 Pac. 231. See also Henkle v. McClure, 32 Ohio St. 202; Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S. W. 743; Russell v. Nail, 79 Tex. 664, 15 S. W. 635; Maxwell v. Hannibal & St. J. R. Co. 85 Mo. 106; Becker v. Becker, 45 Iowa, 239; S. v. Pratt, 20 Iowa, 269. Contra: S. v. Owens, 79 Mo. 619.

[25*] Colby v. Portman, 115 Mich. 95, 72 N. W. 1098.

[26] S. v. Meller, 13 R. I. 669; Indianapolis, P. & C. R. Co. v. Bush, 101 Ind. 582; Links v. S. 13 Lea (Tenn.) 701; Pfaffenback v. Lake S. & M. S. R. Co. 142 Ind. 246, 41 N. E. 530; Busch v. Fisher, 89 Mich. 192, 50 N. W. 788; Deerfield v. Northwood, 10 N. H. 269; Griffith v. Hanks, 91 Mo. 109, 4 S. W. 508; Mimns v. S. 16 Ohio St. 221; Bridyers v. Dill, 97 N. Car. 222, 1 S. E. 767; Beck v. Cole, 16 Wis. 95; Pennsylvania Co. v. Roy, 102 U. S. 451; King v. Rea, 13 Colo. 69, 21 Pac. 1084; Zehner v. Kepler, 16 Ind. 290.

instructing them to disregard it.[27] An instruction based upon incompetent and irrelevant evidence is erroneous in that it is misleading.[28]

§ 85. **Speculative evidence—Insufficient.**—Evidence which is so slight that it is merely speculative on any material matter of fact in a case will not warrant the giving of instructions.[29] So an instruction founded upon an hypothesis of fact of which there is no direct evidence, but only the possibility of an inference, is improper and not a sufficient basis for the giving of instructions.[30] And although an instruction may be properly drawn and applicable to the facts of a case, yet where there is such a slight weight of evidence that the verdict could not reasonably be different than the one rendered, the refusal to give the instruction is but harmless error.[31]

§ 86. **Slight evidence will support instructions.**—But on the other hand if there is any evidence, though slight, fairly tending to support a proposition of law applicable to the case, a party is entitled to have the jury instructed accordingly. The court has nothing whatever to do with the weight or value of the evidence. It is the province of the jury, and not the court, to determine the facts.[32] Thus in an action for personal injury, if

[27] Prior v. White, 12 Ill. 260, 265. See Quinn v. P. 123 Ill. 347, 15 N. E. 46.

[28] Evans v. George, 80 Ill. 51. See also Harding v. Wright, 119 Mo. 1, 24 S. W. 211; Dickerson v. Johnson, 24 Ark. 251; Willits v. Chicago, B. & K. C. R. Co. 80 Iowa, 531, 45 N. W. 916.

[29] Com. v. Hillman, 189 Pa. St. 548, 42 Atl. 196; S. v. Evans, 138 Mo. 116, 39 S. W. 462; Watts v. Southern Bell T. & T. Co. 66 Fed. 453; Statford v. Goldring, 197 Ill. 156, 64 N. E. 395; Steed v. S. (Tex. Cr. App.) 67 S. W. 328; Gambrill v. Schooley, 95 Md. 260, 52 Atl. 500; Cawfield v. Ashville St. R. Co. 111 N. Car. 597, 16 S. E. 703; S. v. Evans, 138 Mo. 116, 39 S. W. 462. See Cleveland, C. C. & St. L. R. Co. v. Drumm (Ind.) 70 N. E. 286 (possible benefits).

[30] Com. v. Boutwell, 162 Mass. 230, 38 N. E. 441; Parker v. Taylor (Neb.) 91 N. W. 537; Sutton v. Madre, 47 N. Car. 320; Bloyd v. Pollock, 27 W. Va. 75; Lemasters v. Southern P. R. Co. 131 Cal. 105, 63 Pac. 128.

[31] Crain v. First Nat. Bank, 114 Ill. 516, 527, 2 N. E. 486. Evidence held sufficient to support instructions in the following cases: Pence v. Wabash R. Co. 116 Iowa, 279, 90 N. W. 59; Yontz v. Com. 23 Ky. L. R. 1868, 66 S. W. 383 (conspiracy in murder case); White v. S. 133 Ala. 122, 32 So. 139 (conspiracy); Wheeler v. S. 158 Ind. 687, 63 N. E. 975 (relating to violent temper as a basis for insanity). Evidence held not sufficient to warrant the giving of instructions: Com. v. Hillman, 189 Pa. St. 548, 42 Atl. 196 (insanity); Grace v. S. (Tex. Cr. App.) 69 S. W. 529.

[32] Baltimore & O. R. Co. v. Faith, 175 Ill. 58, 51 N. E. 807; Edwards v. Dellenmair, 85 Ill. App. 366;

the testimony of the plaintiff alone tends to show permanent injury, it is proper to instruct the jury as to such injury. Expert testimony in such case is not necessary.[33] And the fact that the evidence may appear unreasonable or inconsistent will not warrant the court in refusing an instruction based thereon.[34]

§ 87. Circumstantial evidence sufficient.—An instruction may properly be given, though not supported by direct statement of witnesses; any inference which may be fairly drawn from the evidence is sufficient to warrant the giving of instructions if otherwise correct.[35] Thus where there is no direct evidence that a deed was delivered, but there was evidence that it was recorded, that is sufficient to warrant the giving of instructions on the issue as to whether the deed was delivered or not.[36]

House v. S. (Tex. Cr. App.) 69 S. W. 417; Jones v. Fort, 36 Ala. 449; Richmond P. & P. Co. v. Allen (Va.) 43 S. E. 356; Bradford v. Pearson, 12 Mo. 71; Turner v. Ter. 11 Okla. 660, 69 Pac. 804; Com. v. Rogers, 181 Mass. 184, 63 N. E. 421; Walls v. Walls, 170 Pa St. 48, 32 Atl. 649; Union M. L. Ins. Co. v. Buchanan, 100 Ind. 73; Brannum v. O'Conner, 77 Iowa, 632, 42 N. W. 504; S. v. Ezzard, 40 S. Car. 312, 18 S. E. 1025; Chicago Packing & Provision Co. v. Tilton. 87 Ill. 547; City of Chicago v. Shelton, 75 Ill. 468; Kendall v. Brown, 74 Ill. 232; Harmon v. S. 158 Ind. 37, 63 N. 630; Winne v. Hammond, 37 Ill. 99; Newbury v. Getchell & M. L. Mfg. Co. 100 Iowa, 441, 69 N. W. 743; Brooks v. S. (Tex. Cr. App.) 31 S. W. 410; Callahan v. City of Port Huron, 128 Mich. 673, 87 N. W. 880; Union Pac. R. Co. v. Ruzika (Neb.) 91 N. W. 543; Ter. v. Guillen (N. Mex.) 66 Pac. 527; Grimsinger v. S. (Tex. Cr. App.) 69 S. W. 583; Young v. Alford, 118 N. Car. 215, 23 S. E. 978; Honesty v. Com. 81 Va. 283; S. v. Wright, 112 Iowa, 436, 84 N. W. 541; Hanes v. S. 155 Ind. 112, 57 N. E. 704 (rape); Williams v. Watson, 71 Ill. App. 130; S. v. Mahoney, 24 Mont. 281, 61 Pac. 647; Thompson v. Duff, 119 Ill. 226, 10 N. E. 399; Chicago R. I. & P. R. Co. v. Lewis, 109 Ill. 120, 131; Chicago & W. I. R. Co. v. Bingenheimer, 116 Ill. 226, 230, 4 N. E. 840; Chicago W. D. R. Co. v. Mills, 105 Ill. 70; Enright v. P. 155 Ill. 34, 39 N. E. 561; Brown v. S. (Tex. Cr. App.) 29 S. W. 772; Brown v. Everett Ridley Ragan Co. 111 Ga. 404, 36 S. E. 813; Missouri Furnace Co. v. Abend, 107 Ill. 50; Baltimore & O. S. W. R. Co. v. Faith, 175 Ill. 58, 51 N. E. 807; Kehoe v. Allentoron & L. V. Tr. Co. 187 Pa. St. 474, 41 Atl. 310, 43 W. N. C. 189; Reusens v. Lawson, 96 Va. 285, 31 S. E. 528; Tyson v. Williamson, 96 Va. 636, 32 S. E. 42; Wooters v. King, 54 Ill. 343; Richmond P. & P. Co. v. Allen (Va.), 43 S. E. 356; Carter v. Kaufman (S. Car.), 45 S. E. 1017.

[33] North Chicago St. R. Co. v. Shreve, 171 Ill. 441, 49 N. E. 534.

[34] Hayes v. S. (Tex. Cr. App.) 39 S. W. 106; Campbell v. Preferred M. A. Asso. 172 Pa. St. 561, 33 Atl. 564, 32 L. R. A. 766.

[35] Maes v. Texas & N. O. R. Co. (Tex. Cv. App.) 23 S. W. 725; Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625; Quinn v. Eagalston, 108 Ill. 256; Chicago, R. I. & P. R. Co. v. Lewis, 109 Ill. 134. See also Sword v. Keith, 31 Mich. 247; Peoria, M. & I. Ins. Co. v. Anapow, 45 Ill. 86; S. v. Tucker, 38 La. Ann. 789.

[36] Horton v. Smith, 115 Ga. 66, 41 S. E. 253.

Where there is any evidence, though slight, tending to prove a material point or fact, the opposing party will not be heard to complain of the refusal of an instruction submitting the insufficiency of the evidence as to such fact when it was not disputed by him on the trial.[37]

§ 88. **Evidence sufficient—Criminal case.**—And in a criminal case if there is any evidence, though weak or slight, tending to prove a legal defense or material fact, it is error to refuse instructions based on such evidence.[38] Thus where there is some evidence, though weak, tending to show that the defendant was mentally incapable of committing the crime charged, it is error to refuse instructions as to his mental condition.[39] And according to this rule, where the testimony of the defendant alone tends to establish a legal defense, as self-defense, he has a right to have the jury correctly instructed as to the law applicable to that defense.[40]

Thus on a charge of assault with intent to kill, where the defendant shows by his own testimony that he did not use his weapon until he had been beaten by the prosecuting witness and another, he is entitled to instructions on the law of self-defense.[41] And on a charge of larceny, there being evidence tending to prove that certain property alleged to have been stolen from a smokehouse by the accused was obtained by him from a third person, he is entitled to have the jury instructed that if they believe from the evidence that he got the property from such third person they should acquit him, and a refusal to so instruct is error.[42] Where there is some evidence, though slight, tending to prove a conspiracy, that issue should be submitted to the jury by proper instructions.[43] For instance, in a larceny case where it appears from the evidence that other persons besides

[37] Schier v. Dankwardt, 88 Iowa, 750, 56 N. W. 420.

[38] S. v. Newman, 57 Kas. 705, 47 Pac. 881; Bargna v. S. (Tex. Cr. App.) 68 S. W. 997.

[39] S. v. Newman, 57 Kas. 705, 47 Pac. 881.

[40] Enright v. P. 155 Ill. 34, 39 N. E. 561; S. v. Fredericks, 136 Mo. 51, 37 S. W. 832; Bedford v. S. (Tex. Cr. App.) 38 S. W. 210.

[41] Rucker v. S. (Tex. Cr. App.) 40 S. W. 991.

[42] Yarbrough v. S. (Ala.) 20 So. 534.

[43] Mitchell v. S. 133 Ala. 65, 32 So. 132; Stevens v. S. 133 Ala. 28, 32 So. 270; White v. S. 133 Ala. 122, 32 So. 139; S. v. Finley, 118 N. Car. 1161, 24 S. E. 495; Bridges v. S. 110 Ala. 15, 20 So. 348.

the defendant were present when the crime is alleged to have been committed, who may have acted in concert with the defendant, it is proper to instruct the jury that if they find the offense was committed by the defendant as the sole perpetrator, or that she acted in concert with others in the perpetration of the offense, they should find her guilty.[44]

§ 89. Evidence sufficient—Larceny.—Where the value of a portion of stolen property which was found in possession of the defendant made the offense only petit larceny it was held error to refuse to instruct on petit larceny, although the value of all the property taken was much in excess of the value constituting petit larceny, in a case where it appeared from the evidence that there were several persons in the house from which the property was stolen.[45] Also the defendant is entitled to an instruction on petit larceny under an indictment charging grand larceny, where it is doubtful from the evidence whether the property taken was of sufficient value to make the stealing grand larceny.[46]

§ 90. Instructions stating issues and contentions.—While it is customary for the trial court to make a brief presentation of the issues raised by the pleadings as a preface to the law embodied in the charge to the jury, there is no rule requiring the court to make such presentation, and a charge cannot be held defective on that ground.[47] In Kentucky it has been held that the practice of stating the issues in charging the jury is unusual and not to be commended, but not error to do so.[48] But the jury should have a clear understanding of the nature of the issues and contentions of the parties, and to that end it is proper for the court to briefly state the substance of the pleadings. This is better than to refer the jury to the pleadings.[49]

[44] Ter. v. De Gutman, 8 N. Mex. 92, 42 Pac. 68.

[45] P. v. Comyus, 114 Cal. 107, 45 Pac. 1034.

[46] S. v. Thompson, 137 Mo. 620, 39 S. W. 83, 59 L. R. A. 581; P. v. Comyus, 114 Cal. 107, 45 Pac. 1034.

[47] Galveston, H. & S. A. R. Co. v. Hitzfelder (Tex. Cv. App.) 66 S. W. 707. Contra: Texas & N. O. R. Co. v. Mortensen (Tex. Cv. App.) 66 S. W. 99.

[48] Chesapeake & O. R. Co. v. Dupee's Adm'r, 23 Ky. L. R. 2349, 67 S. W. 15.

[49] San Antonio A. P. R. Co. v. De Ham (Tex. Cv. App.) 54 S. W. 395; Conley v. Redwine, 109 Ga. 640, 35 S. E. 92; West v. Averill Grocery Co. 109 Iowa, 488, 80 N. W. 555; City of Ft. Madison v. Moore, 109 Iowa, 476, 80 N. W. 527; Stuart v. Line, 11 Pa. Sup. Ct. 345; Polykranas v. Kransz, 77 N. Y. S. 46, 73 Ap. Div. 583; Bryce v. Cayce, 62 S. C. 546, 40 S. E.

An explanation of the contentions of the respective claims of the parties enables the jury to act more intelligently in deciding the issues, and to reach a fair verdict.[50] However, the court, in stating the issues, should not copy the pleadings into the instructions, as this is a bad practice and should be avoided.[50*] It is sufficient to state the substance of the pleadings, but the court should guard against a misstatement of the issues, that the jury may not be misled.[50**] After once stating the material allegations of the pleadings and the contentions of the parties they may afterwards be referred to in general terms in the charge by stating that the plaintiff is required to establish each of the material allegations of his complaint by a preponderance of the evidence.[51] Where some of the issues may have been abandoned, or other change has taken place since the suit was instituted, the court may, in charging the jury, state how the issues originally stood, and may restrict them in their deliberations to the issues after such changes.[52]

§ 91. Instructions as to immaterial issues.—The court in charging the jury should state which are the material issues, es-

948; Nashville R. Co. v. Norman, 108 Tenn. 324, 67 S. W. 479; Sage v. Haines, 76 Iowa, 581, 41 N. W. 366; North Chicago St. R. Co. v. Polkey, 203 Ill. 225, 232, 67 N. E. 793. It is the duty of the court to instruct the jury as to the issues involved: Pittsburg, C. C. & St. L. R. Co. v. Kinnare, 203 Ill. 388, 392, 67 N. E. 826; S. v. Davis, (N. Car.) 46 S. E. 723. See Union Gold Min. Co. v. Crawford, 29 Colo. 511, 69 Pac. 600; Ferris v. Marshall (Neb.), 96 N. W. 602; Stevens v. Maxwell, 65 Kas. 835, 70 Pac. 873.

[50] S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. Cr. R. 219; P. v. Worden, 113 Cal. 569, 45 Pac. 844; S. v. Smith, 65 Conn. 283, 31 Atl. 206; Pritchett v. S. 92 Ga. 65, 18 S. E. 536; Hawes v. S. 88 Atl. 37, 7 So. 302; Hawley v. Chicago & C. R. Co. 71 Iowa, 717, 29 N. W. 787; West Chicago St. R. Co. v. Lieserowitz, 197 Ill. 607, 64 N. E. 718; Gilchrist v. Hartley, 198 Pa. St. 132, 47 Atl. 977; S. v. Davis (N. Car.) 46 S. E 723.

[50*] Parkins v. Mo. P. R. Co. (Neb.) 93 N. W. 197; Shebeck v. National Cracker Co. 120 Iowa, 414, 94 N. W. 930. See Livingston v. Stevens (Iowa) 94 N. W. 925.

[50**] Howell v. Wilcox & Gibbs S. M. Co. 12 Neb. 177, 10 N. W. 700; Stafford v. City of Oskaloosa, 57 Iowa, 748, 11 N. W. 668; Reed v. Gould, 93 Mich. 359, 53 N. W. 356; Hall v. Woodin, 35 Mich. 67; Shibek v. Nat. Cracker Co. (Iowa), 94 N. W 930.

[51] Scott v. Provo City, 14 Utah, 31, 45 Pac. 1005; Texas & N. O. R. Co. v. Mortenen (Tex. Cv. App.) 66 S. W. 99. See Jensen v. Steiber (Neb.) 93 N. W. 697. For the purpose of avoiding repetition, instructions may refer to others given in the charge; McElya v. Hill, 105 Tenn. 319, 59 S. W. 1025; S. v. Haines, 160 Mo. 555, 61 S. W. 621.

[52] Rome R. Co. v. Thompson, 101 Ga. 26, 28 S. E. 429. See City of Peoria v. Gerber, 168 Ill. 323, 48 N. E. 152.

pecially if immaterial issues become involved in the case.[53] The court is not required to take notice of an immaterial issue; hence instructions requested on such an issue are properly refused.[54] But as a general rule the giving of an instruction on an immaterial issue is harmless.[55]

§ 92. Instructions ignoring issues.—The giving of an instruction designed to call the attention of the jury to the issues presented by the pleadings, but which omits any material issue, is error.[56] Thus in an action for personal injury an instruction given which wholly ignores the necessity for the exercise of reasonable care on the part of the plaintiff is erroneous, unless cured by other instructions;[57] or an instruction ignoring the fact that the defendant is required to exercise care and caution is also erroneous.[58] Or to single out one of the several important issues and submit it as the controling issue is improper and prejudicial.[59] So it is likewise error for the court to direct the attention of the jury to a subordinate issue, and to return a verdict based upon their finding on such issue.[60]

§ 93. Issues unsupported by evidence.—As a general rule it is error in the giving of instructions to submit to the jury for their determination any issue presented by the pleadings which the evidence does not tend to establish.[61] Thus, for example, it

[53] West v. S. 63 Neb. 257, 88 N. W. 503.

[54] Maher v. James Hanley Brewing Co. 23 R. I. 343, 50 Atl. 392; S. v. Clark, 51 W. Va. 457, 41 S. E. 204.

[55] Ætna Life Ins. Co. v. Sanford, 200 Ill. 126, 65 N. E. 661.

[56] Carruth v. Harris, 41 Neb. 789, 60 N. W. 106; Leiter v. Lyons (R. I.) 52 Atl. 78.

[57] Western Stone Co. v. Whalen, 151 Ill. 472, 487, 38 N. E. 241, 42 Am. St. 244; Sinclair v. Berndt, 87 Ill. 174; Chicago & N. W. R. Co. v. Clark, 70 Ill. 276; Denver Tr. Co. v. Lassasso, 22 Colo 444, 45 Pac. 409 (issue of contributory negligence ignored); McVey v. St. Clair Co. 49 W. Va. 412, 38 S. E. 648 (ignoring issue of contributory negligence).

[58] Lake Shore & M. S. R. Co. v. O'Conner, 115 Ill. 254, 263, 3 N. E. 501.

[59] Bowden v. Achor, 95 Ga. 243, 22 S. E. 254; Dallas & O. O. C. E. R. Co. v. Harvey (Tex. Cv. App.) 27 S. W. 423.

[60] Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978.

[61] Alabama & V. R. Co. v. Hoyne, 24 So. 907; Burnet v. Cavanagh, 56 Neb. 190, 76 N. W. 578; Hamilton v. Singer S. M. Co. 54 Ill. 370; Harris v. Higden (Tex. Cv. App.) 41 S. W. 412; Myers v. S. (Tex. Cv. App.) 39 S. W. 938; Dooner v. Delaware & H. C. Co. 164 Pa. St. 17, 30 Atl. 269; Tettle v. S. (Tex. Cr. App.) 31 S. W. 677; Prewitt v. S. (Tex. Cr. App.) 29 S. W. 792; Barron v. Barron, 122 Ala. 19[illegible], 25 So. 55; S. v. Weaver, 165 Mo. 1, 65 S. W. 308, 88 Am. St. 406; Allen v. S. (Tex. Cr. App.) 66 S. W. 371; Griffin v. Henderson, 117 Ga. 382 43 S. E. 712.

is error to submit to the jury whether or not a party caused an injury by negligence, under a complaint or declaration charging damages to have been sustained by unlawful and wilful conduct, where the evidence fails to show negligence.[62]

And where there are several issues presented by the pleadings, and the evidence tends to support only one or a part of them, it is error to submit to the jury all of the issues; only such of the issues should be submitted as the evidence tends to prove.[63] Also if some of the issues or facts are admitted it is improper to give an instruction calling for proof of all of the issues set out in the pleadings.[64] The fact that the court limits the instructions to the issues set out in the pleadings where a party has the right, under statutory provision, to prove certain matters without setting the same out in the pleadings cannot be complained of as error when no attempt has been made to prove such other matters.[65]

§ 93a. Issue unsupported by evidence—Illustrations.—"You are charged that if you find that the plaintiff received an electric shock while attempting to board one of defendant's cars, then you are instructed that if the defendant, by the use of the highest care, could not have discovered the danger from electricity, and could not have prevented the same, then you cannot presume that the defendant was guilty of negligence merely from the fact that the plaintiff was shocked, and cannot find any damages for the plaintiff resulting as a direct and proximate result of such electric shock unless you find that the presence of such electrictiy in the handholds of said car was caused by some negligence of defendant." There was no error in refusing this charge for the reason that there was no evidence authorizing the submission of the issue presented therein. The witness Gerrett testified that the car was bought in 1895 or 1896, and that it was of an improved make. There was no evidence that at the time of the accident the car, or its appliances, was in proper condition, or that the danger from electricity

[62] Parker v. Hastings, 123 N. Car. 671, 31 S. E. 833.

[63] Hubbard v. Hubbard (Tex. Cv. App.) 38 S. W. 388; Wright v. Hardie (Tex. Cv. App.) 30 S. W. 675; Heller v. Chicago & G. T. R. Co. 109 Mich. 53, 66 N. W. 667, 63 Am. St. 541; Connecticut M. L. Ins. Co. v. McWherter, 73 Fed. 444.

[64] O'Donnell v. Chicago, R. I. & P. R. Co. (Neb.) 91 N. W. 566; Dayton v. City of Lincoln, 39 Neb. 74, 57 N. W. 754.

[65] Kettry v. Thumma, 9 Ind. App. 498, 36 N. E. 919.

could not have been discovered by the exercise of care. It was not shown that it had recently been inspected and found in good repair, or that there was any system of inspection in vogue by the defendant.[66]

In an action for personal injury, the defendant having pleaded a release, the plaintiff claiming that such release was procured by fraud while she was in a dazed condition of mind resulting from the injury, the issue of the mental capacity of the plaintiff should not be submitted to the jury where there is no evidence tending to show want of mental capacity.[67]

§ 94. Instructions based on pleadings.—Instructions must not only be predicated on the evidence but also confined to the issues set forth by the pleadings,[68] and avoid submitting for the determination of the jury matters of fact not in issue.[69] Thus, for example, where the pleadings do not pre-

[66] Dallas C. E. St. R. Co. v. Broadhurst (Tex. Cv. App.) 68 S. W. 315.

[67] Och v. Missouri, K. & T. R. Co. 130 Mo. 27, 31 S. W. 962.

[68] Illinois Cent. R. Co. v. Sanders, 166 Ill. 270, 281, 46 N. E. 799; Frorer v. P. 141 Ill. 171, 187, 31 N. E. 395; Brant v. Gallup, 111 Ill. 487, 493, 53 Am. R. 638; Grim v. Murphy, 110 Ill. 271, 276; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414; Pitstick v. Osterman, 107 Iowa, 189, 17 N. W. 845; Mobile & O. R. Co. v. Godfrey, 155 Ill. 78, 39 N. E. 590; Boldenwick v. Cahill, 187 Ill. 218, 58 N. E. 351; Leach v. Nichols, 55 Ill. 273; Louisville, N. A. & C. R. Co. v. Sheris, 108 Ill. 631; P. v. Lehr, 196 Ill. 361, 63 N. E. 725; Denver & R. G. R. Co. v. Peterson, 30 Colo. 77, 69 Pac. 578; Peters v. McCay & Co. 136 Cal. 73, 68 Pac. 478; Edd v. Union P. Coal Co. 25 Utah, 293, 71 Pac. 215; Chicago, G. W. R. Co. v. Bailey, 66 Kas. 115, 71 Pac. 246 (want of plaintiff's ordinary care); Crooks & Co. v. Eldridge & H. Co. 64 Ohio St. 195, 203, 60 N. E. 203 (damages not claimed by pleadings); Bartlett v. Cunningham, 85 Ill. 22; Sargent v. Linden M. Co. 55 Cal. 204; East St. Louis P. & P. Co. v. Hightower, 92 Ill. 139, 141; Fisk v. Chicago, M. & St. P. R. Co. 74 Iowa, 424, 38 N. W. 132; Savannah, F. & W. R. Co. v. Tiedman, 39 Fla. 196, 22 So. 658; McCann v. Ullman, 109 Wis. 574, 85 N. W. 493; Anderson v. Baird, 19 Ky. L. R. 444, 40 S. W. 923; Rapp v. Kester, 125 Ind. 79, 25 N. E. 141; Austin & N. W. R. Co. v. Flannagan (Tex. Cv. App.) 40 S. W. 1043; Matheson v. Kuhn, 15 Colo. App. 477, 63 Pac. 125; Texas & P. R. Co. v. Vaughan, 16 Tex. Cv. App. 403, 40 S. W. 1065; Gibbs v. Wall, 10 Colo. 153, 14 Pac. 216; Roddy v. Harrell (Tex. Cv. App.) 40 S. W. 1064; Chamberlain Banking H. v. Woolsey, 60 Neb. 516, 83 N. W. 729; Myers v. S. 97 Ga. 76, 25 S. E. 252; P. v. Topia, 131 Cal. 647, 63 P. 1001; Dieckerhoff v. Alder, 32 N. Y. S. 698, 12 Misc. 445; Schrader v. Hoover, 87 Iowa, 654, 54 N. W. 463; Shaughnessy v. Sewell & D. C. Co. 160 Mass. 331, 35 N. E. 861; Tower v. McFarland (Neb.), 96 N. W. 172; Russell v. Huntsville &c. Co. 137 Ala. 627; Joplin Water Works v. Joplin (Mo.), 76 S. W. 960.

[69] Illinois Cent. R. Co. v. Sanders, 166 Ill. 281, 46 N. E. 799; Bourland v. Gibson, 124 Ill. 602, 607, 17 N. E. 319; Merrill v. Suing (Neb.) 92 N. W. 618; Wabash R. Co. v. Stewart, 87 Ill. App. 446; McBaine v. John-

sent the issue of contributory negligence the giving of an instruction on such issue is improper.[70] And by the same rule an instruction charging the jury that the plaintiff may recover damages sustained for any other negligence besides that alleged in his declaration is erroneous.[71]

A party is not entitled to instructions on any element or feature of a case not alleged in his pleadings, or which is not an issue in the case.[72] And if instructions are not confined to the issues presented they should be refused, although otherwise correct.[73]

son, 153 Mo. 191, 55 S. W. 1031; Van Bergen v. Eulberg, 111 Iowa, 139, 82 N. W. 483; City of Dallas v. Beeman, 23 Tex. Cv. App. 315, 55 S. W. 762; Horgan v. Brady, 155 Mo. 659, 56 S. W. 294; Washington Ice Co. v. Bradley, 171 Ill. 255, 49 N. E. 422; Smith v. Bank of New England, 70 N. H. 187, 46 Atl. 230; Rotan Grocery Co. v. Martin (Tex. Cv. App.) 57 S. W. 706.

[70] Perez v. San Antonio & A. P. R. Co. 28 Tex. Cv. App. 255, 67 S. W. 1082; International & G. N. R. Co. v. Locke (Tex. Cv. App.) 67 S. W. 1082; St. Louis S. W. R. Co. v. McAdams (Tex. Cv. App.), 68 S. W. 319.

[71] Chicago & A. R. Co. v. Rayburn, 153 Ill. 290, 38 N. E. 558; Cleveland, C. & St. L. R. Co. v. Walter, 147 Ill. 60, 65, 35 N. E. 529; Chicago, B. & Q. R. Co. v. Libey, 68 Ill. App. 144; Chicago & E. I. R. Co. v. Kneirim, 152 Ill. 465, 39 N. E. 324, 43 Am. St. 259; Lebanon Coal & M A. v. Zerwick, 77 Ill. App. 486; Camp Point Mfg. Co. v. Ballon, 71 Ill. 417; Indianapolis, B. & W. R. Co. v Berney, 71 Ill. 390; Smith v. Wilmington & W. R. Co. 126 N. Car. 712, 36 S. E. 170.

[72] Fetcher v. Louisville & N. R. Co. 102 Tenn. 1, 49 S. W. 739; Columbus, C. & I. C. v. Troech, 68 Ill. 545, 549, 18 Am. R. 578; Taylor v. Felder, 5 Tex. Cv. App 417, 24 S. W. 313; La Grande Ins. Co. v. Shaw (Ore.), 74 Pac. 919.

[73] Johnson v. Johnson, 114 Ill. 611, 622, 3 N. E. 232, 55 Am. R. 883; Hanover Fire Ins. Co. v. Stoddard, 52 Neb. 745, 73 N. W. 291; Sanger v. Thompson (Tex. Cv. App.), 44 S. W. 408; Baldwin v. Cornelius, 104 Wis. 68, 80 N. W. 63; Empson Packing Co. v. Vaughn, 27 Colo. 66, 59 Pac. 749; Richison v. Mead, 11 S. Dak. 639, 80 N. W. 131; Knight v. Pacific C. Stage Co. (Cal.), 34 Pac. 868; Gulf, C. & F. R. Co. v. Higby (Tex. Cv. App.), 26 S. W. 737; Kyner v. Sambuer (Neb.), 91 N. W. 491; Benton Co. Sav. Bank v. Boddicker, 117 Iowa, 407, 90 N. W. 822; French v. Ware, 65 Vt. 338, 26 Atl. 1096; Kelly v. Fleming, 113 N. Car. 133, 18 S. E. 81; Galveston, H. & S. A. R. Co. v. Courtney, 30 Tex. Cv. App. 544, 71 S. W. 307; Beach v. Netherland, 93 Ga. 233, 18 S. E. 525; Gover v. Dill, 3 Iowa, 337; Porter v. White, 128 N. Car. 42, 38 S. E. 24; Ten Eyck v. Witbeck, 55 App. Div. (N. Y.), 165; Kansas Inv. Co. v. Carter, 160 Mass. 421, 36 N. E. 63; Thomas v. S. 126 Ala. 4, 28 So. 591; Texas, &c. R. Co. v. Gray (Tex. Cv. App.), 71 S. W. 316; Schafer v. Gilmer, 13 Nev. 330; Missouri Pac. R. Co. v. Mitchell, 75 Tex. 77; Louisville & N. R. Co. v. Mattingly, 22 Ky. L. R. 489; Bender v. Dugan, 99 Mo. 126, 12 S. W. 795; McGar v. National & P. W. M. Co. 22 R. I. 347, 47 Atl. 1092; Abernathy v. Southern R. I. P. Co. (Tex. Cv. App.), 62 S. W. 786; St. Louis, K. C. & N. R. Co. v. Cleary, 77 Mo. 634; Omaha L. & T. Co. v. Douglas Co. 62 Neb. 1, 86 N. W. 936; Atlas Nat. Bank v. Holm, 71 Fed. 489; Johnson v. Worthy, 17 Ga. 420; City of Dallas v. Breeman, 23 Tex. Cv. App. 315, 55 S. W. 762; Eklund v. Toner, 121 Mich. 687, 80 N. W. 791; Saunders' Ex'rs v. Weeks (Tex. Cv. App.), 55 S. W.

Instructions submitting to the jury an issue not raised by the pleadings nor supported by evidence, which brings into the case many details, having a tendency to mislead and draw the attention of the jury away from the proper issues, are erroneous.[74] So an instruction which directs the jury that they may base a verdict on some matter or thing not raised by the pleadings is improper and generally erroneous.[75]

§ 95. Based on evidence rather than pleadings.—Instructions should be based on the evidence rather than on the pleadings.[76] Thus in a personal injury case an instruction that the jury, in estimating the plaintiff's damages, may consider his loss of time, if any, so far as shown by the evidence, is proper, although the plaintiff's declaration does not, in direct terms, allege any loss of time, but alleges in general terms the injury which caused the loss of time. It is sufficient that the declaration states the

33; Alexander v. Staley, 110 Iowa, 607, 81 N. W. 803; Houston & T. C. R. Co. v. Patterson, 20 Tex. Cv. App. 255, 48 S. W. 747; Rosenblatt v. Haymam, 56 N. Y. S. 378; Rockford Ins. Co. v. Nelson, 65 Ill. 415, 422; Maham v. Com. 21 Ky. L. R. 1807, 56 S. W. 529; Bell v. S. (Tex. Cr. App.), 56 S. W. 913; Sample v. Rand, 112 Iowa, 616, 84 N. W. 945; Breneman v. Kilgore (Tex. Cv. App.), 35 S. W. 202; Phillips v. Cornell, 133 Mass. 546.

[74] Cerrillos Coal R. Co. v. Deseran, 9 N. Mex. 49, 49 Pac. 807; Wells & Co. v. Heintz (Neb.) 72 N. W. 1034; Norfolk Beet Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566; Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272, 283; St. Louis, A. & T. H. R. Co. v. Manley, 58 Ill. 304; Cossitt v. Hobbs, 56 Ill. 238; Blackman v. Kessler, 110 Iowa, 140, 81 N. W. 185; Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2; Georgia, S. & F. R. Co. v. Zarks, 108 Ga. 800, 34 S. E. 127; Rishell v. Weil, 63 N. Y. S. 178, 61 N. Y. S. 1112, 30 Misc. 805; Houston & T. C. R. Co. v. Ritter (Tex. Cv. App.), 41 S. W. 753; Queen Ins. Co. v. Leonard, 9 Ohio C. C. 46.

[75] McCready v. Phillips (Neb.), 67 N. W. 7; Davidson v. Willingford (Tex. Cv. App.), 30 S. W. 827; Sweet v. Excelsior E. Co. 57 N. J. L. 224, 31 Atl. 721; Coos Bay, R. & E. R. Co. v. Siglin, 26 Ore. 387, 38 Pac. 192; Missouri, K. & T. R. Co. v. Wickham (Tex. Cv. App.), 28 S. W. 917; Galveston, H. & S. A. R. Co. v. Siligman (Tex. Cv. App.), 23 S. W. 298; Reed v. Com. 98 Va. 817, 36 S. E. 399; Hartford Fire Ins. Co. v. Josey, 6 Tex. Cv. App. 290, 25 S. W. 685; Mason v. Southern R. Co. 58 S. Car. 70, 79 Am. St. 826; Bruni v. Garza (Tex. Cv. App.), 26 S. W. 108; Neglev v. Cowell, 91 Iowa, 256, 59 S. W. 48; Spitalera v. Second Ave. R. Co. 25 N. Y. S. 919, 73 Hun. 37; Gulf, C. & S. F. R. Co. v. Courtney (Tex. Cv. App.), 23 S. W. 226; Cage v. Tucker's Heirs, 29 Tex. Cv. App. 586, 69 S. W. 425 (validity of a debt); El Paso & N. W. R. Co. v. McComas (Tex. Cv. App.), 72 S. W. 629; Love v. Wyatt, 19 Tex. 312; Southern R. Co. v. O'Bryan, 115 Ga. 659, 42 S. E. 42; Howe Machine Co. v. Riber, 66 Ind. 504; Terry v. Shively, 64 Ind. 112; Williams v. Southern P. R. Co. 110 Cal. 457, 42 Pac. 974; Morrow v. St. Paul C. R. Co. 65 Minn. 382, 67 N. W. 1002; Holt v. Pearson, 12 Utah, 63, 41 Pac. 560; Morearty v. S. 46 Neb. 652, 65 N. W. 784.

[76] Quinn v. P. 123 Ill. 342, 15 N. E. 46. See also Birney v. New

injury without describing it in all its seriousness.[77] So in a criminal case for the larceny of a horse an instruction referring to the horse as a "certain roan horse" is proper where the evidence shows him to be a roan horse, although the indictment does not allege the color of the horse.[78]

§ 96. Instructions confined to defense alleged.—The court in charging the jury should disregard any defense not alleged in the pleadings. In other words, the instructions should be confined to the defense set out in the pleadings.[79] Thus the giving of instructions on the theory of fraud as a defense to an action for the price of property is error where the defense alleged in the pleadings is a breach of warranty, and not fraud.[80] Where the defendant pleads fraudulent representations as a defense to an action against him for the purchase price of property he cannot have the defense of mutual mistake submitted to the jury, that issue not being raised by the pleadings.[81] So in an action for a breach of warranty on the sale of goods an instruction as to what constitutes fraud, is improper where fraud is not an issue in the case.[82]

§ 97. Instruction based on pleadings—Illustrations.—A charge which states that if the jury find for the plaintiff, such damage may be given as under the circumstances of the case may be just, and that in awarding damages they may take into consideration the relation proved as existing between the plaintiff and the deceased, and the injury sustained by the plaintiff, if any, in the loss of the society of the deceased, is improper and erroneous

York & W. P. T. Co. 18 Md. 341, 81 Am. Dec. 607. 2 Thomp. Trials, § 2310.

[77] Chicago City R. Co. v. Hastings, 136 Ill. 254, 26 N. E. 594; City of Chicago v. Sheehan, 113 Ill. 658.

[78] Quinn v. P. 123 Ill. 342, 15 N. E. 46. See Preisker v. P. 47 Ill. 382.

[79] Pittsburg Spring Co. v. Smith, 115 Ga. 764, 42 S. E. 80; Jordan v. Indianapolis Water Co. 155 Ind. 337, 64 N. E. 680.

[80] Farmers' & M. Bank v. Upton, 37 Neb. 417, 55 N. W. 1044. See Burleson v. Lindsey (Tex. Cv. App.), 23 S. W. 729. See Flint v. Van Hall, 4 Tex. Cv. App. 404, 23 S. W. 573.

[81] Braunschweiger v. Waits, 179 Pa. St. 47, 36 Atl. 155; Murchison v. Mansur-Tibbetts Implement Co. (Tex. Cv. App.), 37 S. W. 605. See Daniels v. Florida, C. & P. R. Co. 62 S. Car. 1, 39 S. E. 762.

[82] Wallace v. Wren, 32 Ill. 146; Frick v. Kabaker, 116 Iowa, 494, 90 N. W. 498. A plea of the statute of limitations of three and five years will not warrant the giving of instructions on the statute of limitations of ten years, Stringer v. Singleteny (Tex. Cv. App.), 23 S. W. 1117.

where the complaint or declaration does not allege damages growing out of the loss of the society of the deceased, and no evidence was introduced or offered as to the social relations existing between the plaintiff and the deceased.[83]

In an action brought by a husband for personal injury to his wife an instruction that the plaintiff cannot recover for mental suffering is improper where the plaintiff does not claim damages for mental suffering.[84] So an instruction charging that "where the jury believe from the evidence that an injury was wilfully done, or resulted from a gross neglect of duty by the defendant," then he is liable for such injury, is misleading and prejudicial where such issue is not involved in the case nor supported by the evidence.[85] Another case: Where the defendant asked the court to charge the jury "that if they believe from the evidence that the defendant's ice wagon did not run over the deceased they will find the defendant not guilty." The declaration contained no averment that the wagon ran over the deceased; hence such instruction was properly refused.[86]

§ 98. **Instructions limited to counts.**—A general instruction stating a correct proposition of law applicable to any one or more of the several counts of a declaration is proper if there is evidence to support it, though it may not be applicable to other counts.[87] But where a party is entitled to recover on only one of two or more counts of his pleadings, if at all, the court should so instruct the jury. Thus where the plaintiff's declaration contains two counts, one on a contract and one in tort, the instructions should limit the jury to a finding on only one of the counts.[88]

[83] Holt v. Spokane & P. R. Co. 3 Idaho, 703, 35 Pac. 39.

[84] Dallis Rapid Tr. Co. v. Campbell (Tex. Cv. App.), 26 S. W. 884.

[85] Chicago & A. R. Co. v. Robinson, 106 Ill. 142. See Louisville, N. A. & C. R. Co. v. Shires, 108 Ill. 617; Galveston, H. & S. A. R. Co. v. Johnson (Tex. Cv. App.), 29 S. W. 428; Gulf, C. & S. F. R. Co. v. Cash (Tex. Cv. App.), 28 S. W. 387; Denver & R. G. R. Co. v. Buffehr, 30 Colo. 27, 69 Pac. 582; Louisville R. Co. v. Wills' Admr'x, 23 Ky. L. R. 1961, 66 S. W. 628; South Covington & C. St. R. Co. v. Stroth, 23 Ky. L. R. 1807, 66 S. W. 177; San Antonio & A. P. R. Co. v. Jazo (Tex. Cv. App.), 25 S. W. 712; Dallis, O. & C. E. R. Co. v. Harvey (Tex. Cv. App.), 27 S. W. 423.

[86] Washington Ice Co. v. Bradley, 171 Ill. 258, 49 N. E. 519.

[87] Greenup v. Stoker, 8 Ill. (3 Gilm.), 202, 214; Lake S. & M. S. R. Co. v. Hession, 150 Ill. 546, 37 N. E. 905.

[88] Holst v. Stewart, 161 (Mass.), 516, 37 N. E. 577. See Cobb-Chocolate Co. v. Sandusky, 207 Ill. 463.

Where there is no evidence tending to prove one or more of several counts the court in charging the jury should confine the instructions to the count or counts which the evidence tends to sustain, and not instruct as to the other counts. Thus in a criminal case where an information charges in one count an assault with intent to commit murder and in another count an assault with intent to commit great bodily injury, and there is no evidence tending to prove the charge in the first count, the court should not instruct as to that charge, and to do so is error, although the defendant was not found guilty of the crime charged in that count.[89]

And where there is no evidence to sustain the charge in one of the counts of an indictment which charges the commission of an offense by different means in different counts, the court should instruct the jury that there is no evidence as to such count, and a refusal to do so is error, especially if the jury convict on both or all the counts.[90] Under an indictment containing but one count for the unlawful sale of intoxicating liquor, where the evidence tends to prove several distinct sales at different times, covering a period of several months, the prosecution should be restricted to some one particular transaction or sale, and the court in charging the jury should confine them to the one particular sale to which the prosecution is restricted. Under such indictment an instruction directing the jury to consider all the evidence in determining the guilt or innocence of the accused is erroneous.[91]

§ 99. Issues raised outside of pleadings.—Where the parties raise issues of fact not alleged in the pleadings, without objection, it is not error to instruct the jury on such issues.[92] It is proper to give instructions on the theory upon which the parties try a case, although the pleadings, technically, do not support such theory.[93] When the facts proved are not within the allegations

[89] Botsch v. S. 43 Neb. 501, 61 N. W. 730.

[90] P. v. Vanzile, 143 N. Y. 368, 38 N. E. 380.

[91] Stockwell v. S. 27 Ohio St. 566.

[92] Qualey v. Johnson, 80 Minn. 408, 83 N. W. 393; Davis v. Atlanta & C. A. L. R. Co. 63 S. Car. 577, 41 S. E. 892, also 63 S. Car. 370, 41 S. E. 468; Brusie v. Peck Bros. & Co. 135 N. Y. 622, 32 N. E. 76.

[93] Jarmusch v. Otis Iron & Steel Co. 23 Ohio Cir. 122. See Hansen v. St. Paul Gas Light Co. (Minn.), 92 N. W. 510; Blum v. Whitworth, 66 Tex. 350, 1 S. W. 108.

of the pleadings, and each of the parties procures instructions declaring the law applicable to the facts thus shown, regardless of the issues made by the pleadings, and asks a verdict in accordance therewith, neither will be heard to complain.[94]

§ 100. **Issues abandoned.**—If some of the issues set out in the pleadings have been abandoned during the progress of the trial, by admission or otherwise, then it is proper for the court to restrict the instructions to the remaining issues upon which the parties are contending.[95] Thus where the defendant claims a set-off charging that the plaintiff has failed to perform his contract, and the plaintiff in reply thereto states that a settlement had been made between them every month as to the obligations of the contract, which was not denied by the defendant, he thereby abandoned his defense of set-off, and was not entitled to instructions as to that defense.[96] So where the plaintiff has abandoned a count in his declaration or petition then it is improper to submit to the jury any issue contained in such count.[97]

The giving of an instruction based on an original petition or declaration which has been abandoned by the filing of an amended petition or declaration is error.[98] But the court in charging the jury is not bound to withdraw an abandoned issue.[99] Where an issue in a cause has been disposed of by a former trial, it is improper to instruct the jury in such manner as to impress them with the idea that such issue is still in the case. Thus in a homicide case a conviction of manslaughter is in legal effect an acquittal of murder, and on a second trial the court is not authorized to instruct on the murder charge.[100]

[94] Chicago & A. R. Co. v. Harrington, 192 Ill. 27, 61 N. E. 622; Illinois Steel Co. v. Novak, 184 Ill. 501, 56 N. E. 966.

[95] De Graffenried v. Menard, 103 Ga. 651, 30 S. E. 560; Crum v. Yunott (Ind. App.), 40 N. E. 79; Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 38 N. E. 773. See Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398; Scholtz v. Northwestern M. L. I. Co. 100 Fed. 573; Tathwell v. City of Cedar Rapids, 114 Iowa, 180, 86 N. W. 291. See also Gulf, C. & S. F. R. Co. v. Shieder (Tex. Cv. App.), 26 S. W. 509; Fry v. Leshi, 87 Va. 269, 12 S. E. 671; Bugbee v. Kendricken, 132 Mass. 349.

[96] Doysher v. Adams, 16 Ky. L. R. 582, 29 S. W. 348. See also Fox v. Utter, 6 Wash. 299, 33 Pac. 354.

[97] Columbus S. Bank v. Crane Co. 56 Neb. 317, 76 N. W. 557.

[98] Purdom v. Brussells, 22 Ky. L. R. 1796, 66 S. W. 22; Western U. Tel. Co. v. Johnson (Tex. Cv. App.), 67 S. W. 338.

[99] Galveston, H. & S. A. R. Co. v. Croskell (Tex. Cv. App.), 25 S. W. 486.

[100] P. v. McFarlane, 134 Cal. 618, 66 Pac. 865. In Indiana a defendant who takes a new trial under

§ 101. Theory of party—Instruction.—A party is entitled to instructions fairly presenting to the jury the law applicable to the evidence which tends to support his theory.[101] But, of course, if there is no evidence tending to support a theory there can be no ground for complaint in refusing instructions as to such theory.[102]

Instructions stating the theory of one party on any feature of a case and ignoring the evidence in support of the theory of the opposing party are erroneous.[103] Hence, if there is any evidence tending to support the theory of the defendant the giving of an instruction for the plaintiff, which wholly ignores such theory, is erroneous.[104] Or if the instructions ignore the theory

such circumstances waives the former acquittal and may be convicted of murder on the second trial. Veach v. State, 60 Ind. 291; Burns' R. S. 1901 (Ind.) § 1910.

[101] Fessenden v. Doane, 188 Ill. 232, 58 N. E. 974; Chicago U. Tr. Co. v. Browdy, 206 Ill. 617, 69 N. E. 113; Pennsylvania Co. v. Backes, 133 Ill. 261, 24 N. E. 563; Lamb v. P. 96 Ill. 73, 80; Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; Boice v. Palmer, 55 Neb. 389, 75 N. W. 849; Mobile & O. R. Co. v. Godfrey, 155 Ill. 82, 39 N. E. 590; Missouri, K. & T. R. Co. v. Cardena, 22 Tex. Cv. App. 300, 54 S. W. 312; Robertson v. Burton, 88 Minn. 151, 92 N. W. 538; Defoe v. St. Paul C. R. Co. 65 Minn. 319, 68 N. W. 35; Republican V. R. Co. v. Fink, 18 Neb. 89, 24 N. W. 691; Barker v. S. 126 Ala. 83, 28 So. 589; Beall v. Pearre, 12 Md. 550; Botkin v. Cassady, 106 Iowa, 334, 76 N. W. 722; Hughes Cr. Law § 3249; Lansing v. Wessell (Neb.), 97 N. W. 815; Rhoades v. Chesapeake & O. R. Co. (W. Va.), 55 L. R. A. 175; Lion v. Baltimore City P. R. Co. 90 Md. 266, 44 Atl. 1045, 47 L. R. A. 127; P. v. Rice, 103 Mich. 350, 61 N. W. 540; Buckley v. Silverberg, 113 Ill. 673, 45 Pac. 804. See Galveston, H. & S. A. R. Co. v. Kinnebrew, 7 Tex. Cv. App. 549, 27 S. W. 631; Poole v. Consolidated St. R. Co. 100 Mich. 379, 59 N. W. 390; Memphis St. R. Co. v. Newman, 108 Tenn. 666, 69 S. W. 269; Chicago, R. I. & P. R. Co. v. Buckstaff (Neb.), 91 N. W. 426; Omaha St. R. Co. v. Boeson (Neb.), 94 N. W. 619.

[102] Moore Furniture Co. v. Sloane, 166 Ill. 460, 46 N. E. 1128; Longenecker v. S. 22 Ind. 247.

[103] Mims v. S. 42 Fla. 199, 27 So. 868; Dolphin v. Plumley, 175 Mass. 304, 56 N. E. 281; Campbell v. P. 109 Ill. 565, 576, 50 Am. R. 621; Denny v. Stout, 59 Neb. 731, 82 N. W. 18; Young v. Market, 163 Pa. St. 513, 30 Atl. 196; Jones v. Rex (Tex. Cv. App.), 31 S. W. 1077; Howell v. Mellon, 169 Pa. St. 138, 32 Atl. 450; Sullivan v. S. 80 Miss. 596, 32 So. 2; Banner v. Schlesinger, 109 Mich. 262, 67 N. W. 116; Hays v. Pennsylvania R. Co. 195 Pa. St. 184, 45 Atl. 925.

[104] Mobile & I. R. Co. v. Godfrey, 155 Ill. 82, 39 N. E. 590; Polly v. Com. 16 Ky. L. R. 203, 27 S. W. 862; Boice v. Palmer, 55 Neb. 389, 75 N. W. 849; Webb v. Big Kanawha & O. R. P. Co. 43 W. Va. 800, 29 S. E. 519; Cerrolis Coal Co. v. Deserant, 9 N. Mex. 49, 49 Pac. 807; Blanchard v. Pratt, 37 Ill. 243; Bloch v. Edwards, 116 Ala. 90, 22 So. 600; Lindle v. Com. 23 Ky. L. R. 1307, 68 S. W. 986; S. v. Brady, (Iowa), 97 N. W. 64; De Foe v. St. Paul C. R. Co. 65 Minn. 319, 68 N. W. 35; Kadish v. Young, 108 Ill. 170, 185, 48 Am. R. 548; Parker v. Chancellor, 78 Tex. 524, 15 S. W. 157; Laughlin v. Gerardi, 67 Mo. App. 372; Oliver v. Moore (Tex. Cv. App.), 43 S. W. 812; Atlanta C. St. R. Co. v. Hardage, 93 Ga. 457, 21

of a party as to any one element or branch of a case they are erroneous.[105]

So where the evidence tends to support two opposing theories on a material issue or fact, and the court instructs as to the theory of the prosecution and refuses to instruct on the theory of the defense it is error.[106] If there is any evidence tending to support the theory of a party an instruction so drawn that it withdraws from the jury the consideration of such theory is erroneous.[107] But the theory of each of the parties need not be stated in a single instruction.[108]

§ 102. Instruction when several theories.—Where the evidence tends to support two different theories by which it is sought to prove a material fact, a charge to the jury ignoring the evidence of one of such theories is erroneous.[109] The charge should be comprehensive enough to cover both theories, especially where the pleading of a party sets out different theories in different counts. And the court may properly call the attention of the jury to the different theories. This rule applies to both civil and criminal cases.[110]

So for the court, in charging the jury, to confine them by instructions to one view of the case when the evidence is of such character that different constructions or views may be drawn from it, is error.[111] Likewise in an action of trespass for an assault, where there is evidence tending to prove self-defense, an instruction ignoring that issue is improper.[112] And where the evidence tends to support several different defenses it is

S. E. 100; Caraway v. Citizens N. B'k (Tex. Cv. App.), 29 S. W. 506; Memphis St. R. Co. v. Newman, 108 Tenn. 666, 69 S. W. 269; Jackson v. Com. 96 Va. 107, 30 S. E. 452.

[105] Oliver v. Moore (Tex. Cv. App.), 43 S. W. 812; Pope v. Riggs (Tex. Cv. App.), 43 S. W. 306; Eppstein v. Thomas (Tex. Cv. App.), 44 S. W. 893.

[106] Jackson v. Com. 96 Va. 107, 30 S. E. 452.

[107] Liner v. S. 124 Ala. 1, 27 So. 438.

[108] Chicago, R. I. & P. R. Co. v. Groves, 56 Kas. 601, 44 Pac. 628.

[109] Town of Wheatfield v. Grundmann, 164 Ill. 250, 45 N. E. 164; Collins v. Waters, 54 Ill. 486; Suther v. S. 118 Ala. 88, 24 So. 43; White v. Dinkins, 19 Ga. 285; Sackett. v. Stone, 115 Ga. 466, 41 S. E. 564; Kennedy v. Forest Oil Co. 199 Pa. St. 644, 49 Atl. 133; Ter. v. Baca (N. Mex.), 71 Pac. 460; McVey v. St. Clair Co. 49 W. Va. 412, 38 S. E. 648; Deasey v. Thurman, 1 Idaho, 779; Anderson v. Norwill, 10 Ill. App. 240; Blue Valley Lumber Co. v. Newman, 58 Neb. 80, 78 N. W. 374.

[110] P. v. Willett, 105 Mich. 110, 62 N. W. 1115.

[111] Samuel v. Knight, 9 Pa. Super. Ct. 352, 43 W. N. C. 392.

[112] Collins v. Waters, 54 Ill. 486.

proper to submit to the jury whether any one of them has been established.[113] But where two theories set up as a defense are inconsistent the court may properly instruct that both theories cannot be true, being inconsistent.[114] But in a criminal case, although the different theories urged by the accused as a defense may be conflicting, it is not improper to instruct upon all of them.[115] An instruction may be given to meet a theory advanced by the opposing party, though there is no evidence upon which to base the instruction.[116]

To instruct the jury to find for the plaintiff if, from the evidence, his theory is more acceptable and more consistent than the theory of the defendant is error. It is the duty of the jury to determine whether or not the plaintiff has proved his case by a preponderance of the evidence.[117] So in a case where negligence is made a material issue by the pleadings it is improper to state that if the evidence shows any other theory as probable as that of the plaintiff then the plaintiff cannot recover.[118] So in a criminal case an instruction that if the evidence develops two theories, one of guilt and the other of innocence, and the jury are in doubt which of the two theories is established they should find the defendant not guilty, is improper.[119] It is also improper to instruct the jury that if the evidence for the defendant is as strong as that for the state he should be acquitted.[120]

§ 103. Instructions when several theories—Illustrations.—The following cases serve as illustrations of the rule. Thus on a charge of rape where the defendant gives evidence that the alleged sexual intercourse was with the consent of the female it is error to refuse instructions on that theory.[121] Or in a larceny case where the defense is that the defendant took the property, believing in good faith that it belonged to him or

[113] Liverpool & T. S. Ins. Co. v. Joy, 26 Tex. Cv. App. 613, 64 S. W. 786; Bank of Calloway v. Henry (Neb.), 92 N. W. 631.

[114] McGowen v. Larsen, 66 Fed. 910; Anderson v. Oskamp (Ind. App.), 35 N. E. 207.

[115] Carver v. S. 36 Tex. Cr. App. 552, 38 S. W. 183.

[116] American M. U. Ex. Co. v. Milk, 73 Ill. 224.

[117] Rommeny v. City of New York, 63 N. Y. S. 186;

[118] Watts v. Southern Bell T. & T. Co. 66 Fed. 460.

[119] Thomas v. S. 103 Ala. 18, 16 So. 4; Johnson v. S. 102 Ala. 1, 16 So. 99.

[120] Mann v. S. 134 Ala. 1, 32 So. 704.

[121] Sergest v. S. (Tex. Cr. App.), 57 S. W. 845.

his mother, to refuse to charge on this theory is error.[122] And if the defendant owned, or believed he owned, the property and had a right to take it, the court may explicitly charge the jury that in such case there is no offense.[123]

On a charge of receiving and selling stolen property, where the evidence tends to prove that the defendant reasonably and honestly believed that he had a right to dispose of the property, he is entitled to have his defense affirmatively presented to the jury by proper instructions, although another instruction given may state that the receipt of the property, knowing it had been stolen, is essential to a conviction.[124] Or where there is any evidence tending to prove that the defendant's possession of the property was lawful he is entitled to instructions on that theory.[125] Or on a trial for embezzlement if there is evidence tending to prove that the defendant appropriated the property under an honest belief that he had a right to do so it is error to refuse to so instruct the jury.[126]

§ 104. Instructions need not notice opposing theory.—But the rule which requires that instructions shall be given according to the theory of each party does not require that the instructions shall anticipate the existence of hypotheses contrary to that upon the theory of which they are framed. That an instruction rests upon an hypothesis which is sustained by evidence, and that it states accurately and fully the law upon that hypothesis, is sufficient without anticipating any theory of the opposing party. And if the evidence also fairly presents hypotheses sustaining, modifying or repugnant to legal propositions, a party desiring to avail himself of such propositions may have them presented in separate instructions.[127] Hence the plaintiff

[122] Vance v. S. 34 Tex. Cr. App. 395, 30 S. W. 792; Barnes v. S. 103 Ala. 44, 15 So. 901. See S. v. Jackson, 126 Mo. 521, 29 S. W. 601; Clark v. S. 34 Tex. Cr. App. 120, 29 S. W. 382; Young v. S. 34 Tex. Cr. App. 290, 30 S. W. 238; Phillips v. S. (Tex. Cr. App.), 31 S. W. 644; Reese v. S. (Tex. Cr. App.), 68 S. W. 283; Chambers v. S. (Tex. Cr. App.), 68 S. W. 286; Homer v. S. (Tex. Cr. App.), 68 S. W. 999; S. v. Main, 75 Conn. 55, 52 Atl. 257.

[123] Black v. S. 38 Tex. Cr. App. 58, 41 S. W. 606.

[124] Harris v. S. (Tex. Cr. App.), 57 S. W. 833; Gann v. S. 42 Tex. Cr. App. 133, 57 S. W. 837.

[125] Pace v. S. (Tex. Cr. App.), 31 S. W. 173; Brown v. S. 34 Tex. Cr. App. 150, 29 S. W. 772.

[126] Wadley v. Com. (Va.), 30 S. E. 452.

[127] Cook County v. Harms, 108 Ill. 151, 161; Springfield Consol. R. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; Trask v. P. 104 Ill. 569; City of Chicago v. Schmidt, 107 Ill. 191; Illinois Cent. R. Co. v. Byrne, 205 Ill. 21, 68 N. E. 720.

is not bound to anticipate and exclude the defense. He is only obliged to present the law applicable to his theory of the case.[128]

The plaintiff is not required in his instructions to negative mere matters of defense.[129] So where an instruction tells the jury that if they believe from the evidence that the plaintiff has proved his case as laid in his declaration, or in any one of the counts thereof, they will find for the plaintiff, it is proper.[130] And so where the rights of a party, such, for instance, as his claim of set-off, are fully stated in his own instructions he cannot complain because his opponent's instructions may be silent as to such a claim or right. The court is not required to embrace such party's claim in the instructions of the opposing party.[131] But, of course, where there is evidence to support the claim or contention of a party, and such claim is ignored by the refusal of his instructions and is not recognized in the instructions given for his opponent, it is manifest error.[132]

§ 105. Instructions confining jury to evidence.—The jury in their deliberations should not only be confined to the pleadings, but also to the evidence adduced, and the court should instruct them that they must not be influenced by any information outside of the evidence; especially is this caution proper when any of the jurors ask questions.[133] The formula that "if you believe from the evidence" is the usual expression used in drawing instructions in referring to the evidence, but it is not necessary that this should be stated in each sentence of an instruction.[134] Nor is it necessary that all of the instructions given should contain this requirement.[135]

For, although an instruction standing alone may be faulty

[128] Eames v. Rend, 105 Ill. 506, 509; Logg v. P. 92 Ill. 604.

[129] Mt. Olive & S. Coal Co. v. Rademancher, 190 Ill. 538, 544, 60 N. E. 888.

[130] Mt Olive Staunton Coal Co. v. Rademancher, 190 Ill. 538, 542, 60 N. E. 888.

[131] Mueller v. Rosen, 179 Ill. 131, 53 N. E. 625.

[132] McCormick v. Kreinkle, 179 Ill. 301, 53 N. E. 549. See Lindeman v. Fry, 178 Ill. 174, 52 N. E. 851.

[133] Citizens St. R. Co. v. Burke, 98 Tenn. 650, 40 S. W. 1085; Wharton v. S. 45 Tex. 2.

[134] Gizler v. Witzel, 82 Ill. 322, 325; Belden v. Woodmanse, 81 Ill. 25, 28; Miller v. Bathasser, 78 Ill. 305; Mathews v. Hamilton, 23 Ill. 416, 418; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Powers v. Com. 22 Ky. L. R. 1807, 61 S. W. 735; S. v. Davis, 27 S. Car. 609, 4 S. E. 567; Slack v. Harris, 200 Ill. 114, 65 N. E. 437.

[135] Padfield v. P. 146 Ill. 660, 662, 35 N. E. 469.

in not confining the jury to the evidence, that is, by omitting to charge that "if they believe from the evidence," yet where other instructions which are given, direct the jury to confine their deliberations to the evidence the defect will be regarded cured.[136] But it is only where the facts hypothetically stated are controverted by the opposing party that the formula "if you believe from the evidence" is important or essential.[137]

An instruction which is but the statement of a legal proposition, containing only a hypotehtical statement of facts, is not objectionable in that it does not make reference to the evidence or is not restricted thereto.[138] It is not improper to use the words "if the evidence shows you" instead of "if you believe from the evidence" in framing instructions.[139] Where the court in charging the jury states that everything done by them in determining the facts must be done "under the evidence," that is sufficient caution that the jury must confine their deliberations to the evidence before them without repeating the cautionary words in every sentence.[140]

§ 106. Confining jury as to damages.—Instructions which do not confine the jury to the evidence, nor place a limit upon the amount of damages to be awarded, if any, are improper.[141] Public policy, sympathy, or the like, are not proper elements to be taken into account in assessing damages; so an instruction authorizing the jury to take into consideration such elements is improper. The jury should be confined to the evidence.[142]

[136] Speir v. P. 122 Ill. 1, 244, 12 N. E. 865, 17 N E. 899, 3 Am. St. 320; Chicago & E. I. R. Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028; Boykin v. P. 22 Colo. 496, 45 Pac. 419. See Godwin v. S. 73 Miss. 873, 19 So. 712; Ingols v. Plimpton, 10 Colo. 535, 16 Pac. 155; Graff v. P. 134 Ill. 380, 25 N. E. 563; McPherson v. St. Louis, I. M. & S. R. Co. 97 Mo. 253; Home v. Walton, 117 Ill. 130, 7 N. E. 100; Rock I. & P. R. Co. v. Leisy, 174 Ill. 547, 51 N. E. 572; Holliday v. Burgess, 34 Ill. 193; Parker v. Fisher, 39 Ill. 164, 171.

[137] Schmidt v. Pfau, 114 Ill. 494, 504, 2 N. E. 522.

[138] Belt v. P. 97 Ill. 461, 472.

[139] Silberberg v. Pearson, 75 Tex. 287, 12 S. W. 850.

[140] Indianapolis St. R. Co. v. Robinson, 157 Ind. 414, 61 N. E. 936. Charging the jury that the issues are to be determined "by looking to the testimony of the witnesses who have testified in the case" is not error, although the defendant made a statement giving his version of the transaction and denying his guilt; Sledge v. S. 99 Ga. 684, 26 S. E. 756, 59 Am. St. 251; Burney v. S. (Ga.), 25 S. E. 911.

[141] Central R. Co. v. Barmister, 195 Ill. 48, 62 N. E. 864; Oglesby v. Missouri P. R. Co. (Mo.), 37 S. W. 829.

[142] Robelson v. Brown, 56 Neb. 390, 76 N. W. 891.

Thus an instruction that if the jury find the defendant guilty they may assess the plaintiff's damages at an amount not to exceed the amount claimed in the declaration is erroneous in not confining the jury to the evidence.[143] So an instruction that the plaintiff cannot recover more than five thousand dollars if he is entitled to recover; and if the jury believe from the evidence that the plaintiff is entitled to recover they will render a verdict for no more than that amount is erroneous, in that it tells the jury to render a verdict for five thousand dollars and does not confine them to the evidence.[144] Also for the same reason, an instruction permitting the jury to give such an amount "as they shall deem a fair and just compensation" is erroneous;[145] or an instruction that the jury may allow as damages such sum as the evidence proves, is erroneous where the evidence shows a greater amount than that claimed in the complaint or declaration.[146]

So a charge that the jury in determining the amount of damages should allow such sum as seems proper under the circumstances, and shall consider bodily and mental pain and probable future injury resulting from the injury inflicted, is erroneous as authorizing the jury to find damages for permanent injury without any evidence as to the amount.[147] But an instruction that the jury are to assess damages at such sum as in their judgment the plaintiff is entitled to under the evidence,

[143] Chicago, B. & Q. R. Co. v. Sykes, 96 Ill. 162, 173; Martin v. Johnson, 89 Ill. 537; Gilbertson v. Forty-Second St. M. & St. N. Ave. R. Co. 43 N. Y. S. 782, 14 App. Div. 294; Hoover v. Haynes (Neb.), 91 N. W. 392; Chicago, R. I. & T. R. Co. v. Erwin (Tex. Cv. App.), 65 S. W. 496 (party must request specific instruction). It has been held improper to charge that it is the "duty" of the jury to assess damages, but that they may be, or are, at liberty to do so, Chicago & N. W. R. Co. v. Chisholm, 79 Ill. 584, 591. Compare Nicholson v. Merritt, 23 Ky. L. R. 2281, 67 S. W. 5; P. v. McGraw, 72 N. Y. S. 679, 66 App. Div. 372; Yazoo, &c. R. Co. v. Smith (Mass.), 35 So. 168.

[144] Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426. See Isaac v. McLean, 106 Mich. 79, 64 N. W. 2.

[145] Rolling Mill Co. v. Morrissey, 111 Ill. 650; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 409, 51 N. E. 811; City of Freeport v. Isbell, 83 Ill. 440, 25 Am. R. 407; Chicago, B. & Q. R. Co. v. Levy, 160 Ill. 385, 43 N. E. 357. See Cunningham v. Stein, 109 Ill. 375 (correct); Yazoo & M. V. R. Co. v. Smith (Miss.), 35 So. 168; Nashville, C. & St. L. R. Co. v. Witherspoon (Tenn.), 78 S. W. 1052.

[146] Texas, &c. R. Co. v. Durrett, 24 Tex. Cr. App. 103, 58 S. W. 187; City of Dallas v Jones (Tex.), 53 S. W. 377.

[147] Houston, E. & W. T. R. Co. v. Richards, 20 Tex. Cr. App. 203, 49 S. W. 687.

is not faulty in stating that the jury may make up their verdict outside of the evidence.[148]

§ 107. Common and personal knowledge.—The court may instruct on matters of common knowledge, or may refuse to do so in its discretion. It is not error to refuse to charge the jury on matters of common knowledge and experience of all men who have arrived at years of discretion.[149] The jury in weighing evidence always exercise their judgment in the light of their own general knowledge of the subject in hand whether instructed to do so or not; but a refusal to so instruct is not error.[150]

But an instruction permitting the jury to consider their own personal knowledge as well as the evidence in determining a material fact is erroneous, as they are required to decide questions of fact from the evidence only.[151] The belief of the jury in determining the facts must be based upon the evidence; hence an instruction that if the jury believe "from the evidence and the instructions of the court, etc," is improper.[152]

§ 108. Confined within statute of limitations—Criminal cases. The evidence must be confined to some time within the statute of limitation. Hence the failure to instruct that unless the alleged offense be shown to have been committed within the statutory limitation a conviction cannot be had is error, especially where there is no evidence to bring the offense charged within the statute of limitation.[153] Thus, on a charge of adultery, where it appears from the evidence that the offense was committed after the filing of the complaint, but before the filing of the formal information, the refusal to instruct the jury that a conviction cannot be had on any evidence of acts committed after the filing of

[148] Calumet River R. Co. v. Moore, 124 Ill. 337, 15 N. E. 764; Illinois, &c. R. Co. v. Thompson, 210 Ill. 226, 238.

[149] Lesser Cotton Co. v. St. Louis, I. & M. S. R. Co. 114 Fed. 133, 144.

[150] Baker v. Borrelli, 136 Cal. 160, 68 Pac. 591; Renard v. Grande, 29 Ind. App. 579, 64 N. E. 644.

[151] Gibson v. Correker, 91 Ga. 617, 17 S. E. 965 (value of land); Stiles v. Neillsville Milling Co. 87 Wis. 266, 58 N. W. 411; Brakken v. Minneapolis & St. L. R. Co. 29 Minn. 43, 11 N. W. 124; Douglass v. Trask, 77 Me. 35; Schultz v. Bower, 57 Minn 493, 59 N. W. 631, 47 Am. St. 630; Petty John v. Liebscher, 92 Ga. 149, 17 S. E. 1007; S. v. Jones, 29 S. Car. 201, 7 S. E. 296; Burrows v. Delta Tr. Co. 106 Mich. 582, 64 N. W. 501.

[152] Kranz v. Thieben, 15 Ill. App. 482; Greer v. Com. 23 Ky. L. R. 489, 63 S. W. 443.

[153] S. v. Kunhi, 119 Iowa, 461, 93 N. W. 342.

the complaint is error.[154] An instruction charging the jury to determine whether at any time within the statute of limitations the defendant committed the crime alleged is not improper, although the evidence limits the inquiry to a less period of time.[155]

§ 109. Limiting evidence to specific purpose.—Evidence competent only for some specific purpose should be limited to that particular purpose by proper instructions, and a refusal to so instruct is error.[156] This rule governs in both civil and criminal cases alike.[157]

§ 110. Limited to impeaching witnesses.—Thus where the prosecution introduces evidence to show a former conviction of the defendant for the purpose of discrediting his testimony, it is error for the court to refuse to limit such evidence by proper instructions, and it cannot be considered for any other purpose.[158] An instruction limiting the evidence of the prior conviction of the accused to the sole purpose of impeaching him as a witness in his own behalf is perfectly proper and beneficial to the defendant rather than hurtful.[159] And where evidence is admissible only for the purpose of discrediting or impeaching a

[154] Proctor v. S. (Tex. Cr. App.), 35 S. W. 172.

[155] S. v. Waddle, 100 Iowa, 57, 69 N. W. 279.

[156] Robertson v. S. 40 Fla. 509, 24 So. 474; Finley v. S. (Tex. Cr. App.), 47 S. W. 1015; Bone v. S. 102 Ga. 387, 30 S. E. 845; Gatlin v. S. (Tex. Cr. App.), 49 S. W. 87; Martin v. S. (Tex. Cr. App.), 53 S. W. 849; Triolo v. Foster (Tex. Cv. App.), 57 S. W. 695; Com. v. Wilson, 186 Pa. St. 1, 40 Atl. 283; White v. Walker, 31 Ill. 422, 433; Missouri, K. & T. R. Co. v. Collins, 15 Tex. Cv. App. 21, 39 S. W. 150; Pittsburg, C. C. & St. L. R. Co. v. Parish, 28 Ind. App. 189, 62 N. E. 514, 91 Am. St. 120; Roos v. Lewyn, 5 Tex. Cv. App. 593, 24 S. W. 538; Scott v. S. (Tex. Cr. App.), 68 S. W. 680; Faulkner v. S. 43 Tex. Cr. App. 311, 65 S. W. 1093; Camarillo v. S. (Tex. Cr. App.), 68 S. W. 795; Tedbetter v. S. (Tex. Cr.) 32 S. W. 903; Bondurant v. S. 125 Ala. 31, 27 So. 775. Contra: Unless inferences might be drawn from it injurious to the rights of the defendant: Winfrey v. S. 41 Tex. Cr. App. 539, 56 S. W. 919; Blanco v. S. (Tex. Cr. App.), 57 S. W. 828; S. v. Tommy, 19 Wash. 270, 53 Pac. 157 (confession of co-defendant).

[157] Boggess v. Boggess, 127 Mo. 305, 29 S. W. 1018; Lydick v. Gill (Neb.), 94 N. W. 109. But if at the time certain evidence is introduced, the court or counsel state to the jury that it is competent and offered only for a particular purpose, a failure to limit such evidence to that purpose by proper instruction is not material error, Roark v. S. 105 Ga. 736, 32 S. E. 125.

[158] Fosdahl v. S. 87 Wis. 482, 62 N. W. 185; Hulton v. S. (Tex. Cr. App.), 33 S. W. 969. See Boutwell v. S. (Tex. Cr. App.), 35 S. W. 376; Scoville v. S. (Tex. Cr. App.), 77 S. W. 792.

[159] Thornton v. S. 117 Wis. 338, 93 N. W. 1107, 98 Am. St. 924.

witness who has testified on the trial of the case, it is error to refuse to thus limit it.[160]

§ 111. Limited to malice or intent.—Where evidence of the declarations of the defendant as to any previous acts not connected with the transaction described in the indictment is competent only on the question of malice or intent, it should be limited by proper instructions to such malice or intent.[161] But, on the contrary, it has been held that where evidence of other acts of the defendant similar to that charged in the indictment is admitted to prove guilty intent, the court is not bound to instruct for what purpose such evidence is admitted.[162]

§ 112. Limited to certain defendants.—Testimony which is competent against one or more of several defendants jointly tried on a criminal charge should be limited to him against whom it is competent, by proper instructions.[163] Accordingly, evidence of any declarations or statements made by one of two or more persons jointly tried which is competent only against him who made the same should be limited to him by instruction, and to refuse such instruction is error.[164]

A confession made by one of two or more defendants jointly

[160] Coker v. S. (Tex. Cr. App.), 31 S. W. 655; Mark v. S. 34 Tex. Cr. 136, 31 S. W. 408; Oliver v. S. 33 Tex. Cr. App. 541, 28 S. W. 202; Paris v. S. (Tex. Cr. App.), 31 S. W. 855; Golin v. S. 37 Tex. Cr. App. 90, 38 S. W. 794; Gills v. Com. 18 Ky. L. R. 560, 37 S. W. 269; Guinn v. S. (Tex. Cr. App.), 65 S. W. 376; Ashcraft v. Com. 24 Ky. L. R. 488, 68 S. W. 847; Fuqua v. Com. 24 Ky. L. R. 2204, 73 S. W. 782; Owens v. S. 35 Tex. Cr. App. 345, 33 S. W. 875.

[161] Kollock v. S. 88 Wis. 663, 60 N. W. 817; Hacker v. Heiney, 111 Wis. 313, 87 N. W. 249; S. v. Geddes, 22 Mont. 68, 55 Pac. 919, relating to motive.

[162] Shipp v. Com. 19 Ky. L. R. 634, 41 S. W. 856; Mosely v. S. 36 (Tex. Cr. App.), 578, 38 S. W. 197; Thomley v. S. 36 Tex. Cr. App. 118, 34 S. W. 264, 61 Am. St. 837; But if no request is made to thus limit such evidence, a party will not be heard to complain of error in that regard, P. v. Connelly (Cal.), 38 Pac. 42; Sproul v. City of Seattle, 17 Wash. 256, 49 Pac. 487; S. v. Gaston, 96 Iowa, 505, 65 N. W. 415; Duke v. S. 35 Tex. Cr. App. 283, 33 S. W. 349. The court is not bound on its own motion to instruct the jury for what particular purpose evidence is admissible, Purcell v. Tibbles, 101 Iowa, 24, 69 N. W. 1120; Puth v. Zinbleman, 99 Iowa, 641, 68 N. W. 895.

[163] Crosby v. P. 137 Ill. 334, 27 N. E. 49; Bennett v. P. 96 Ill. 606; Sparf v. U. S. 156 U. S. 57, 15 Sup. Ct. 273, 10 Am. Cr. R. 174; Casner v. S. 42 Tex. Cr. App. 118, 57 S. W. 821; Segrest v. S. (Tex. Cr. App.), 57 S. W. 845; Williams v. S. 81 Ala. 1, 1 So. 179, 7 Am. Cr. R. 451, 60 Am. R. 133. See S. v. Bowker, 26 Ore. 309, 38 Pac. 124, 9 Am. Cr. R. 366; Cleveland v. Anderson (Neb.), 92 N. W. 306.

[164] S. v. Collins, 121 N. Car. 667, 28 S. E. 520; Short v. S. (Tex. Cr. App.), 29 S. W. 1072.

indicted, but not in the presence of any of the others, is competent, if competent at all, only against the one making the same, and the jury should be cautioned by proper instructions not to consider it against the others.[165] A charge that a confession made by one or more of several defendants applies only to the one making it, and that it has no application to any one of the others, and does not implicate any of them so far as that particular confession is concerned, sufficiently cautions the jury.[166]

And where on a joint indictment the evidence shows that the defendants have different and distinct defenses the court should, on proper request, instruct as to the defense of each, and a refusal to do so is error.[167] The failure of the court to limit evidence to the particular purpose for which it is competent cannot be complained of as error in the absence of a request to do so.[168] So where evidence is competent against some of several joint defendants, but incompetent as to others, the fact that such evidence was not limited to the defendant against whom it was competent, nor the jury instructed not to consider it against the others, cannot be complained of as error in the absence of a request to limit the evidence.[169]

§ 113. Instructions giving prominence to certain facts.—It is the duty of the jury to consider all of the testimony in the case. Therefore the instructions should be so drawn as to avoid giving prominence to certain portions of the evidence to the exclusion of other portions.[170] An instruction which singles out and draws

[165] S. v. Oxendine, 107 N. Car. 783, 12 S. E. 573; Casner v. S. 42 Tex. Cr. App. 118, 57 S. W. 821 (conspiracy); Wilkerson v. S. (Tex. Cr. App.), 57 S. W. 956.

[166] Nobles v. S. 98 Ga. 73, 26 S. E. 64; Wilkerson v. S. (Tex. Cr. App.), 57 S. W. 956 (held not assuming accomplice made a statement).

[167] Ross v. S. (Tex. Cr. App.), 43 S. W. 1004.

[168] Boggess v. Boggess, 127 Mo. 305, 29 S. W. 1018; Lydick v. Gill, (Neb.), 94 N. W. 109.

[169] Coddington v. Canaday, 157 Ind. 243, 61 N. E. 567.

[170] Moore v. Wright, 90 Ill. 471; Chesney v. Meadows, 90 Ill. 431; Scott v. P. 141 Ill. 208, 30 N. E. 346; Hartshorn v. Byrne, 147 Ill. 426, 35 N. E. 246; Smith v. S. 109 Ga. 479, 35 S. E. 59; Chicago & E. I. v. Fuller, 195 Ill. 18, 62 N. E. 919; Christie v. P. 206 Ill. 342, 69 N. E. 33; New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; Coffin v. U. S. 162 U. S. 664, 16 Sup. Ct. 943; Argabright v. S. 49 Neb. 760, 69 N. W. 102; Burton v. S. 107 Ala. 108, 18 So. 284; Virgie v. Stetson, 73 Me. 452; Bush v. S. 37 Ark. 215; Mendes v. Kyle, 16 Nev. 369; McCorkle v. Simpson, 42 Ind. 453; Mead v. Brotherton, 30 Mo. 201; Holt v. S. 62 Ga. 314; Banner v. Schlessinger,

the attention of the jury to particular facts in evidence to the exclusion of others which are quite as important in determining the issues involved is erroneous.[171]

Instructions which give prominence to the testimony of one

109 Mich. 262, 67 N. W. 946; Barker v. S. 48 Ind. 163; Heddle v. City Elec. R. Co. 112 Mich. 547, 70 N. W. 1096; Com. v. Delaney, 16 Ky. L. R. 509, 29 S. W. 616; Gross v. Shaffer, 29 Kas. 442; Slack v. Harris, 200 Ill. 96, 65 N. E. 669; Martens v. Pittock (Neb.), 92 N. W. 1038; Vaughn v. S. 130 Ala. 18, 30 So. 669; Willingham v. S. 130 Ala. 35, 30 So. 429; Reynolds v. Com. 24 Ky. L. R. 1742, 72 S. W. 277; Southern Bell T. & T. Co. v. Mayo, 133 Ala. 641, 33 So. 16; Brickill v. City of Baltimore, 60 Fed. 98 (relating to damages); Louisville & N. R. Co. v. Banks (Ky.), 33 S. W. 627; Wadsworth v. Williams, 101 Ala. 264, 13 So. 755; Newton v. S. 37 Ark. 333; Sexton v. School District, 9 Wash. 5, 36 Pac. 1052; Hurlbut v. Boaz, 4 Tex. Cv. App. 371, 23 S. W. 446; Lake S. & M. S. R. Co. v. Whidden, 23 Ohio Cir. 85; Birmingham Southern R. Co. v. Cuzzart, 133 Ala. 262, 31 So. 979; Crossen v. Oliver, 41 Ore. 505, 69 Pac. 308; Postal Tel. C. Co. v. Jones, 133 Ala. 217, 32 So. 500; O'Neal v. Curry, 134 Ala. 216, 32 So. 697; Alabama M. R. Co. v. Thompson (Ala.), 32 So. 672; Wilson v. White, 80 N. Car. 280; Com. v. Delaney, 16 Ky. L. R. 509, 29 S. W. 616; Leise v. Meyer, 143 Mo. 547, 45 S. W. 282; Francis v. S. (Tex. Cr. App.), 55 S. W. 488; Jones v. Jones, 19 Ky. 1516, 43 S. W. 412; Frost v. S. 124 Ala. 85, 27 So. 251; P. v. Reed (Cal.), 52 Pac. 835; Craig v. Miller, 133 Ill. 305, 24 N. E. 431; Sheehan v. P. 131 Ill. 25, 22 N. E. 818; Chittenden v. Evans, 41 Ill. 254; Chicago, B. & Q. R. Co. v. Warner, 108 Ill. 550; Jacksonville & S. E. R. Co. v. Walsh, 106 Ill. 257. Properly refused: Callaghan v. Myer, 89 Ill. 569; Hewitt v. Johnson, 72 Ill. 513; Merrill v. Hale, 85 Iowa, 66; Model Mill Co. v. McEver, 95 Ga. 701; Fox v. P. 84 Ill. App. 270; Packer v. Thompson-Houston E. Co. 175 Mass. 496, 56 N. E. 704; Trumbull v. Erickson, 97 Fed. 891; Tibbe v. Kamp, 154 Mo. 545, 55 S. W. 440; S. v. Rutherford, 152 Mo. 124, 53 S. W. 417; Todd v. Danner, 17 Ind. App. 368, 46 N. E. 829. See Gordon v. Burris, 153 Mo. 223, 54 S. W. 546. See Davis v. Concord & M. R. Co. 68 N. H. 247, 44 Atl. 388; Mosely v. Washburn, 167 Mass. 345, 45 N. E. 753; Williamson v. Tyson, 105 Ala. 644, 17 So. 336; Stone v. S. 105 Ala. 60, 17 So. 114; Idaho Mercantile Co. v. Kalanquin (Idaho), 66 Pac. 933; Warden v. Miller, 112 Wis. 67, 87 N. W. 828; Haney v. Breeden, 100 Va. 781; Martens v. Pittock (Neb.), 92 N. W. 1038.

[171] Drainage Coms. v. Illinois Cent. R. Co. 158 Ill. 353, 358, 41 N. E. 1073; Homes v. Hale, 71 Ill. 552; Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499; Hoge v. P. 117 Ill. 35, 46, 6 N. E. 796; Crain v. First National Bank, 114 Ill. 527, 2 N. E. 486; Calef v. Thomas, 81 Ill. 478, 483; Jacobi v. S. 133 Ala. 1, 32 So. 158; S. v. Prater, 52 W. Va. 132, 43 S. E. 230, 241; Dobbs v. Cate, 60 Mo. App. 658; Chaney v. Phœnix Ins. Co. 62 Mo. App. 45; Coffin v. U. S. 162 U. S. 664, 16 Sup. Ct. 943; Ball v. S. (Tex. Cr. App.), 36 S. W.448; Logg v. P. 92 Ill. 598, 602; Bourquin v. Bourquin, 110 Ga. 440, 35 S. E. 710; McCartney v. McMullen, 38 Ill. 237; C. A. Fargo & Co. v. Dixon, 63 Ill. App. 22; Moran v. Higgins, 19 Ky. L. R. 456, 40 S. W. 928; Missouri, K. & T. R. Co. v. Collins, 15 Tex. Cv. App. 21, 39 S. W. 150; Bell v. Hutchings (Tex. Cv. App.), 41 S. W. 200; Com. v. Gray, 17 Ky. 354, 30 S. W. 1015; Robinson v. Love, 50 W. Va. 75, 40 S. E. 454; Bachmeyer v. Mutual R. T. Life Asso. 87 Wis. 325, 58 N. W. 399 (insanity an issue); Bowling Green Stone Co. v. Capshaw, 23 Ky. L. R. 945, 64 S. W. 507.

of the parties to the suit without adverting to the testimony of the other, for the same reason, should not be given.[172] Especially is it error in charging the jury to single out the facts which are strongest against a party and fail to refer to those favorable to him.[173] And if it clearly appears that such instructions must have misled the jury to the prejudice of the rights of the complaining party a new trial should be given.[174]

To single out an unimportant fact tending to prove an element in a case, as if it were the only question to be considered, and base an instruction upon it is misleading.[175] Especially where the evidence is slight or highly contradictory is it improper for the court in giving instructions to select isolated portions of the evidence and give them prominence.[176] The attention of the jury should not be directed to any particular circumstance alone unless there is some special reason for so doing.[177]

§ 114. Singling out facts—When not objectionable.—But singling out some particular question or point and calling the attention of the jury to it is not objectionable where the other questions involved are merely subordinate and are sufficiently

[172] McCabe v. City of Philadelphia, 12 Pa. Sup. Ct. 383; Hays v. Pennsylvania R. Co. 195 Pa. St. 184, 45 Atl. 925; Pyle v. Pyle, 158 Ill. 300, 41 N. E. 999; Simpson Brick Press Co. v. Wounley, 166 Ill. 383, 46 N. E. 967; Weiss v. Bethleham Iron Co. 88 Fed. 23; Holmes v. Hale, 71 Ill. 552; Hatch v. Marsh, 71 Ill. 370, 374; Village of Warren v. Wright, 103 Ill. 298, 304; Barton v. Strond Gibson Grocer Co. (Tex. Cv. App.), 40 S. W. 1050; Louisville & N. R. Co. v. Jones, 130 Ala. 456, 30 So. 586; Flowers v. Flowers, 92 Ga. 688, 18 S. E. 1006; Haney v. Breeden, 100 Va. 781, 42 S. E. 916; Evans v. George, 80 Ill. 51; Graves v. Colwell, 90 Ill. 612; Reber v. Herring, 115 Pa. St. 599, 8 Atl. 830; Atlanta C. St. R. Co. v. Jones, 116 Ga. 369.

[173] Brantley v. S. 115 Ga. 229, 41 S. E. 695; Jefferson v. S. 110 Ala. 89, 20 So. 434; Godwin v. S. 73 Miss. 873, 19 So. 712; Williams v. S. 46 Neb. 704, 65 N. W. 783 (on insanity).

[174] Jacksonville & S. E. R. Co. v. Walsh, 106 Ill. 253; Polly v. Com. 16 Ky. L. R. 203, 27 S. W. 862; Bertram v. People's R. Co. 154 Mo. 639, 55 S. W. 1040.

[175] Bibbins v. City of Chicago, 193 Ill. 363, 61 N. E. 1030; Protection Life Ins. Co. v. Dill, 91 Ill. 177; Graves v. Colwell, 90 Ill. 612, 619; City of Joliet v. Seward, 86 Ill. 402, 405; Manley v. Boston & M. R. Co. 159 Mass. 493, 34 N. E. 951; Gunther v. Gunther, 181 Mass. 217, 63 N. E. 402; Rising v. Nash, 48 Neb. 597, 67 N. W. 460.

[176] Frame v. Badger, 79 Ill. 441, 446; Sullivan v. Eddy, 164 Ill. 391, 396, 45 N. E. 837; Flowers v. Flowers, 92 Ga. 688, 18 S. E. 1006. See also San Antonio & A. P. R. Co. v. Green (Tex. Cv. App.), 49 S. W. 672; Meyer v. Pacific R. Co. 40 Mo. 151; Grube v. Nichols, 36 Ill. 92, 98.

[177] Seiler v. S. 112 Wis. 293, 87 N. W. 1072; White v. Epperson (Tex. Cr. App.), 73 S. W. 851; S. v. Buralli (Nev.), 71 Pac. 532 (reviewing many cases); Wilson v. S. (Tex. Cr. App.), 36 S. W. 587.

adverted to by other instructions;[178] and where, in the contest of a will, the court has properly charged that the jury must consider all the evidence in determining the issues, it is not error then to direct their attention to certain particular matters and say that these matters, of themselves, are not sufficient to establish either claim of the contestant.[179]

Where damages to be ascertained rest upon several separate alleged grievances, which may be considered separately as items, attention may properly be called to any one of such subjects without reference to the others.[180] So where some particular portion of the evidence or the testimony of a certain witness, if true, is decisive of the cause, it is not improper to call the attention of the jury to such evidence or witness, though reference is not made to other evidence.[181] A charge that "if the jury believe from all the evidence before them that the plaintiff did not receive any of the injuries complained of in his petition then it will be their duty to find for the defendant," was held proper, and does not give undue prominence to a particular question.[182]

§ 115. Singling out facts—Criminal cases.—In a criminal cause the court should not designate any particular part or branch or fact of a case, and tell the jury that unless it is proved beyond a reasonable doubt they should acquit.[183] Especially in a summary instruction is it improper to single out and direct the attention of the jury to particular portions of the evidence to the exclusion of other parts equally as important in determining the issues.[184] Singling out the strong points for the prosecution

[178] International Bank v. Ferris, 118 Ill. 470, 8 N. E. 825.

[179] Goldthorp v. Goldthorp, 115 Iowa, 430, 88 N. W. 944.

[180] St. Louis, J. & S. R. Co. v. Kirby, 104 Ill. 345, 349.

[181] Love v. Gregg, 117 N. Car. 467, 23 S. E. 332; Hart v. Bray, 50 Ala. 446.

[182] Weeks v. Texas Midland R. (Tex. C. App.), 67 S. W. 1071.

[183] Mullins v. P. 110 Ill. 42; Davis v. P. 114 Ill. 86, 29 N. E. 192; Leigh v. P. 113 Ill. 372; Crews v. P. 120 Ill. 317, 11 N. E. 404; Hornish v. P. 142 Ill. 626, 32 N. E. 677; S. v. Smith, 53 Mo. 267; Ball v. S. (Tex. Cr. App.), 36 S. W. 448; Morgan v. S. 48 Ohio, 371, 27 N. E. 710; McLeroy v. S. 120 Ala. 274, 25 So. 247.

[184] Scott v. P. 141 Ill. 210, 30 N. E. 329; Chambers v. P. 105 Ill. 417; Campbell v. P. 92 Ill. 602; Coon v. P. 99 Ill. 371; Kennedy v. P. 44 Ill. 285; Coffman v. Com. 10 Bush (Ky.) 495. 1 Am. Cr. R. 294; Preston v. S. 41 Tex. Cr. App. 252, 53 S. W. 881; S. v. Rutherford, 152 Mo. 124, 53 S. W. 417. See also: Sanders v. P. 124 Ill. 226, 16 N. E. 81; Evans v. George, 80 Ill. 51; Hoge v. P. 112 Ill. 46, 6 N. E. 796; P. v. Hawes, 98 Cal. 648, 33 Pac.

by calling the witnesses by name is highly improper and prejudicial, especially where the evidence for the defendant is not thus emphasized and very material points in his evidence not even referred to.[185]

In a homicide case a requested instruction telling the jury that they may look to any threats made by the deceased against the accused, in determining whether the deceased or the accused was the aggressor, is improper as directing the attention of the jury to a particular fact to the exclusion of other evidence in the case.[186] An instruction that flight may indicate a consciousness of guilt, or may be caused from an innocent motive, and that the jury may look to the fact that the defendant surrendered himself in determining his guilt or innocence, is for the same reason improper.[187] The court in charging the jury is not required to single out each of the facts tending to connect the accused with the crime charged.[188]

§ 116. Instructions ignoring facts.—An instruction which ignores material facts in issue presented by the pleadings is erroneous when the evidence tends to establish such facts.[189] A

791; Morgan v. S. 48 Ohio St. 377, 27 N. E. 710; Grant v. S. 97 Ala. 35, 11 So. 915; Goley v. S. 85 Ala. 333, 5 So. 167; P. v. Caldwell, 107 Mich. 374, 65 N. W. 213; Miller v. S. 107 Ala. 40, 19 So. 37; Dobson v. S. 61 Neb. 584, 85 N. W. 843.

[185] P. v. Clark, 105 Mich. 169 62 N. W. 1117; Prim v. S. 73 Miss. 838, 19 So. 711.

[186] Crawford v. S. 112 Ala. 1, 21 So. 214.

[187] White v. S. 111 Ala. 92, 21 So. 330; Albertz v. U. S. 162 U. S. 499. But defendant may sometimes have a right to such an instruction if he requests it, Waybright v. State, 56 Ind. 122.

[188] Punk v. S. (Tex. Cr. App.), 48 S. W. 171. Instructions invading the province of the jury are properly refused, Illinois Cent. R. Co. v. Griffin, 184 Ill. 10, 16, 56 N. E. 337; Pittsburg, Ft. W. & C. R. Co. v. Callaghan, 157 Ill. 406, 413, 41 N. E. 909; Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 57, 7 N. E. 55. Held singling out facts: Bonner v. Com. 18 Ky. 728, 38 S. W. 488; P. v. Sanders, 114 Cal. 216, 46 Pac. 153; Hanrahan v. P. 91 Ill. 142, 146. Held not singling out facts: Jackson v. Kas. City, Ft. S. & M. R. Co. 157 Mo. 621, 58 S. W. 32; Martin v. St. Louis S. W. R. Co. (Tex. Cv. App.), 56 S. W. 1011; International & G. N. R. Co. v. Newman (Tex. Cv. App.), 40 S. W. 854; P. v. Neary, 104 Cal. 373, 37 Pac. 943; Southern Ind. R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722; Lane v. City of Madison, 86 Wis. 453, 57 N. E. 93; Missouri, K. & T. R. Co. v. Coffey (Tex. Cv. App.), 68 S. W. 721; Gran v. Houston, 45 Neb. 813, 64 N. W. 245.

[189] Dobney v. Conley (Tex. Cv. App.), 65 S. W. 1124; Crittenden v. S. 134 Ala. 145, 32 So. 273; Remey v. Olds (Cal.), 34 Pac. 216; Henry v. Stewart, 185 Ill. 448, 57 N. E. 190; Gilmore v. Courtney, 158 Ill. 440, 41 N. E. 1023; Austill v. Heironmymus, 117 Ala. 620, 23 So. 660. See also Illinois Cent. R. Co. v. Gilbert, 157 Ill. 364, 41 N. E. 724; Chicago & W. I. R. Co. v. Flynn, 154 Ill. 453, 40 N. E. 332;

charge which ignores every material fact affecting the rights of the parties and submits to the jury undisputed facts only is erroneous and properly refused.[190] And to state in an instruction that there is only one circumstance tending to prove a material fact and ignoring other evidence from which such fact may be inferred is error.[191]

From this principle it follows that an instruction which purports to sum up the principal facts, but directs the attention of the jury only to those favorable to one of the parties, is bad, as giving prominence to some of the facts in evidence and ignoring others quite as material and important.[192] Or, in other words, an instruction which states the facts from the standpoint of the plaintiff and then concludes that "if you believe these facts you find for the plaintiff" is improper.[193] Likewise an instruction in a criminal case submitting the issue on the evi-

Elgin, J. & E. R. Co. v. Raymond, 148 Ill. 248, 35 N. E. 729; Weiss v. Dittman, 4 Tex. Cv. App. 35, 23 S. W. 229; Fiore v. Ladd, 25 Ore. 423, 36 Pac. 572; Graferman Dairy Co. v. St. Louis Dairy Co. 96 Mo. App. 495, 70 S. W. 390; Penn. Canal Co. v. Harris, 101 Pa. St. 93; Plumb v. Curtis, 66 Conn. 154, 33 Atl. 998; Stocker v. Green, 94 Mo. 280, 7 S. W. 279, 4 Am. St. 382; Sherman v. Kreul, 42 Wis. 33; Sigerson v. Pomeroy, 13 Mo. 620; Hazewell v. Coursen, 81 N. Y. 630; Uhl v. Robison, 8 Neb. 272; Kieldsen v. Wilson, 77 Mich. 45, 43 N. W. 1054; Graves v. Dill, 159 Mass. 74, 34 N. E. 336; Ordway v. Sanders, 58 N. H. 132; Jacob Tome Inst. of Port Deposit v. Crothers, 87 Md. 569, 40 Atl. 261; Wooley v. Lyon, 117 Ill. 244, 250, 6 N. E. 885; Lindeman v. Fry, 178 Ill. 174, 52 N. E. 831; Von Glahn v. Von Glahn, 46 Ill. 134, 139; Blair v. Blanton (Tex. Cv. App.), 55 S. W. 321; North v. Mallory, 94 Md. 305, 51 Atl. 89; Central of Ga. R. Co. v. Dumas, 131 Ala. 172, 30 So. 867; Percival v. Chase, 182 Mass. 371, 65 N. E. 800; Anniston L. & C. Co. v. Lewis, 107 Ala. 538, 18 So. 326; Highland Ave. & B. R. Co. v. Sampson, 112 Ala. 425, 20 So. 566; Soloman v. City Compress Co. 69 Miss. 319, 10 So. 446; Higgins v. Grace, 59 Md. 365; McKay v. Evans, 48 Mich. 597, 12 N. E. 868; McDonough v. Miller, 114 Mass. 94; Ranney v. Barlow, 112 U. S. 207, 5 Sup. Ct. 104; Prothero v. Citizens' St. R. Co. 134 Ind. 431, 33 N. E. 765; Bloch v. Edwards, 116 Ala. 90, 22 So. 600; Charter v. Lane, 62 Conn. 121, 25 Atl. 464; Glass v. Cook, 30 Ga. 133; Chicago &c. Co. v. Moran, 210 Ill. 9, 15.

[190] Henry v. Stewart, 185 Ill. 448, 57 N. E. 190. See Rock Island, &c v. Pohlman, 210 Ill. 139.

[191] Berliner v. Travelers' Ins. Co. 121 Cal. 451, 53 Pac. 922; Costly v. McGowen, 174 Ill. 76, 50 N. E. 1047. See Weidman v. Symes, 116 Mich. 619, 74 N. W. 1008.

[192] Sanders v. P. 124 Ill. 226, 16 N. E. 81; Town of Evans v. Dickey, 117 Ill. 291, 7 N. E. 263; Dupuis v. Chicago & N. R. Co. 115 Ill. 101, 3 N. E. 720; Pennsylvania Co. v. Sloetke, 104 Ill. 201, 205; Coon v. P. 99 Ill. 368; Evans v. George, 80 Ill. 54; Martin v. Johnson, 89 Ill. 537; Cushman v. Cogswell, 86 Ill. 65; New York & T. Land Co. v. Gardner (Tex. Cv. App.), 25 S. W. 737.

[193] Mitchell-Tranter Co. v. Ehmett, 23 Ky. L. R. 1788, 65 S. W. 835, 55 L. R. A. 710.

dence of the prosecution alone is improper in ignoring the defense.[194]

§ 117. Instructions withdrawing facts.—Where there is evidence tending to support an issue of fact properly presented by the pleadings an instruction withdrawing such issue is improper.[195] And if any inference can be fairly drawn from the evidence which tends to support a material fact an instruction withdrawing such fact from the consideration of the jury is improper.[196]

The giving of an instruction withdrawing from the consideration of the jury certain evidence, though slight, which tends to prove a material fact in issue is error.[197] So where documentary evidence proper to be considered has ben introduced, an instruction so framed that it withdraws such documents from the jury is improper. In such case it is error for the court to state that the evidence is what the witnesses testify to on the witness stand.[198] But, on the other hand, where there is no competent evidence tending to prove a particular fact or issue involved, it is proper to withdraw such fact or issue by instructions.[199]

[194] Sanders v. S. 134 Ala. 74, 32 So. 654; Mann v. S. 134 Ala. 1, 32 So. 704; S. v. Gallivan, 75 Conn. 326, 53 Atl. 731, 96 Am. St. 203.

[195] Cicero St. R. Co. v. Brown, 193 Ill. 274, 279, 61 N. E. 1093; Chicago, B & Q. R. Co. v. Sykes, 96 Ill. 162, 176; Ayres v. Pittsburgh, C. C. & St. L. R. Co. 201 Pa. St. 124, 50 Atl. 958 (held not withdrawing); Pritchett v. Munroe, 22 Ala. 501; Providence G. M. Co. v. Thompson (Ariz.), 60 Pac. 874; Chicago, &c. Co. v. Moran, 210 Ill. 9, 15.

[196] Whitehouse v. Bolster, 95 Md. 458, 50 Atl. 240. See also Germania Fire Ins. Co. v. Klewer, 129 Ill. 599, 607, 22 N. E. 489; Chicago & N. R. Co. v. Snyder, 128 Ill. 655, 660, 21 N. E. 520; Cummings v. Tilton, 44 Ill. 172; Dunn v. P. 172 Ill. 582, 599, 50 N. E. 137; Vierling v. Iriquois Furnace Co. 170 Ill. 189, 48 N. E. 1069; Ennis v. Pullman P. C. Co. 165 Ill. 161, 46 N. E. 439; Chicago City R. Co. v. Dinsmore, 162 Ill. 658, 44 N. E. 887; Chicago & A. R. Co. v. Dumser, 161 Ill. 190, 197, 43 N. E. 698; Protection Life Ins. Co. v. Dill, 91 Ill. 174; Chezem v. S. 56 Neb. 496, 76 N. W. 1056; Hayden v. Frederickson, 56 Neb. 141, 80 N. W. 494; Myers v. Walker, 31 Ill. 353, 363; Orne v. Cook, 31 Ill. 238; Ayers v. Metcalf, 39 Ill. 307; Frasure v. Zimmerly, 25 Ill. 184; Bowden v. Achor, 95 Ga. 243, 22 S. E. 254; American Oak Ex. Co. v. Ryan, 104 Ala. 267, 15 So. 807; Woodbury v. S. 69 Ala. 242, 44 Am. R. 515.

[197] Anderson v. Timberlake, 114 Ala. 377, 22 So. 431, 62 Am. St. 155.

[198] Myers v. S. 97 Ga. 76, 25 S. E. 252; Bowden v. Archer, 95 Ga. 243, 22 S. E. 254; Scarbrough v. Blackman, 108 Ala. 656, 18 So. 735; Mode Mill Co. v. McEver, 95 Ga. 701, 22 S. E. 705.

[199] Supreme Council C. K. v. Fidelity & C. Co. 63 Fed. 48; Morgan v. Stone, (Neb.) 93 N. W. 743.

§ 117a. **Action for personal injury from negligence.**—In an action for personal injury resulting from negligence, an instruction which enumerates a certain state of facts and directs the jury that if they find such facts to be true then the party complaining cannot recover for an alleged injury, is erroneous in that it takes from the jury the question of negligence, which is a question of fact for them to determine.[200] For instance, an instruction stating that "it is the duty of a person before attempting to cross a railroad track to stop, if necessary, and look and listen for the approach of trains before entering upon the track; and if the jury believe from the evidence that the plaintiff in this case could have discovered the approach of the defendant's train and avoided the injury in question by having stopped his mule before driving upon the track and looking and listening for the approach of said train then he cannot recover in this case, unless the jury shall believe from the evidence that the agents or servants of the defendants were guilty of gross negligence in the operation of said train," is erroneous, in that it withdraws from the jury the determination of the fact whether or not the plaintiff was guilty of negligence.[201]

§ 118. **Instructions ignoring defense.**—Where there is evidence tending to establish a legal defense to an action, either civil or criminal, the giving of instructions which ignore or disregard such defense is error, although the instructions may in all other respects correctly state the law.[202] Thus in an action charging

[200] Pennsylvania Co. v. Frana, 112 Ill. 404.

[201] Pennsylvania Co. v. Frana, 112 Ill. 404. Instructions held not withdrawing facts from the jury: Hronek v. P. 134 Ill. 135, 147, 24 N. E. 861; Kirby v. Wilson, 98 Ill. 240, 244; Devine v. Chicago, M. & St. P. R. Co. 100 Iowa, 692, 69 N. W. 1042; Dillingham v. Crank, 87 Tex. 104, 27 S. W. 93. It is improper for the court to charge that counsel did not make a certain argument, for the reason that this is a matter as much within the knowledge of the jury as of the judge of the court. Birmingham, R. & E. Co. v. Williams, 119 Ala. 547, 24 So. 548.

[202] Commercial Bank v. Chatfield, 121 Mich. 641, 80 N. W. 712; Baltimore, C. & A. R. Co. v. Kirby, 88 Md. 489, 41 Atl. 777; Globe Oil Co. v. Powell, 56 Neb. 463, 76 N. W. 1081; Harris v. Carrington, 115 N. Car. 187, 20 S. E. 452; Birmingham S. R. Co. v. Cuzzart, 133 Ala. 262, 31 So. 979; Sutherland v. Holliday (Neb.), 90 N. W. 937; Carwile v. Carwile, 131 Ala. 603, 31 So. 568; Jones v. Parker (Tex. Cv. App.), 42 S. W. 123. See Clapper v. Mendill, 96 Mo. App. 106, 69 S. W. 669; Hall v. Vanderpool, 156 Pa. St. 152, 26 Atl. 1069; Burke v. Holmes (Tex. Cv. App.), 68 S. W. 52; Remy v. Olds (Cal.) 34 Pac. 216; Eureka F. Co. v. Baltimore, C. S. & R. Co. 78 Md. 179, 27 Atl. 1035; American C. Tel. Co. v. Noble, 98 Mich. 67, 56 N. W. 1100; Stanfield v. Phœnix L. Asso. 53

negligence, contributory negligence on the part of the plaintiff, is a proper defense; hence the refusal to instruct on the theory of contributory negligence is error if there is any evidence tending to prove contributory negligence.[203]

It has been held that the giving of instructions for the plaintiff in a personal injury case where the defense was contributory negligence, which ignored the theory of the defendant, is error, although such defense may have been presented in other instructions.[204] Where the pleadings properly present the issue as to whether a claim is barred by the statute of limitations, and there is evidence tending to support the contention that the claim is barred, it is error for the court in charging the jury to ignore such defense.[205] So if there is any evidence tending to establish a good defense to a part of a claim, an instruction which ignores the evidence of such defense is erroneous.[206] And in a criminal cause where the testimony for the defendant tends to prove a defense as to any one of several counts of an indictment it is error to refuse instructions as to such defense.[207]

In a criminal case where the branding of cattle is relied upon to establish the taking of them, if there is evidence that the accused was not connected with such branding, the court, on request, should instruct that if the evidence shows that the accused was not connected with such branding then there was no taking of the cattle by him.[208] And where the possession of stolen goods is relied upon to connect the accused with the crime

Mo. App. 595; S. v. Abbott, 65 Kas. 139, 69 Pac. 160 (defense of alibi ignored); Faust v. Hosford, 119 Iowa, 97, 93 N. W. 58; Stoll v. Loving, 120 Fed. 805; Volk v. Roche, 70 Ill. 297; Peoples v. S. (Miss.), 33 So. 289; Woods v. S. 81 Miss. 408, 33 So. 285; Thompson v. Boden, 81 Ind. 176; McGehee v. Lane, 34 Tex. 390; Illinois Cent. R. Co. v. Smith, 208 Ill. 618

[203] Eastman v. Curtis, 67 Vt. 432, 32 Atl. 232; McVey v. St. Clair Co. 49 W. Va. 412, 38 S. E. 648; Denver Tr. Co. v. Lassasso, 22 Colo. 444, 45 Pac. 409.

[204] McCreery's Adm'rs v. Ohio River R. Co. 43 W. Va. 110, 27 So. 327. See generally: Sherwood v. Grand Ave. R. Co. (Mo. App.), 33 S. W. 774; Chicago & A. R. Co. v. Kuckkuck, 197 Ill. 304, 98 Ill. App. 252, 64 N. E. 358; Union Pac. R. Co. v. Ruzika (Neb.), 91 N. W. 543; Van Winkle v. Chicago, M. & St. P. R. Co. 93 Iowa, 509, 61 N. W. 929.

[205] Miller v. Cinnamon, 168 Ill. 451, 48 N. E. 45; See also Pardridge v. Culter, 168 Ill. 511, 48 N. E. 125; Baltimore & S. R. Co. v. Then, 159 Ill. 543, 42 N. E. 971.

[206] Asher v. Beckner, 19 Ky. 521, 41 S. W. 35.

[207] Jones v. S. 80 Miss. 181, 31 So. 581; Hammond v. P. 199 Ill. 173, 64 N. E. 980 (self-defense).

[208] Black v. S. (Tex. Cr. App.), 41 S. W. 606.

charged, the time which elapsed between the commission of the crime and the time when found in possession of the accused is material, and the instructions should cover this feature of the case.[209] Also on a charge of assault with intent to kill and murder it is error to instruct that if the prosecuting witness made an attack on the defendant without any weapon in his hands, and without appearance of any such weapon, then the defendant would not be warranted in using a deadly weapon, because it includes every conceivable case of violent attack and ignores differences of age and strength of the two persons.[210]

§ 119. Instructions summing up the evidence.—The practice of summing up or recapitulating the evidence is of common law origin and prevails in many jurisdictions. In the language of Blackstone, "when the evidence is gone through on both sides the judge, in the presence of the parties, the counsel and all others, sums up the whole to the jury; omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon the evidence."[211]

The practice of summing up the evidence is recognized in jurisdictions where the court is prohibited by constitutional or statutory provisions from expressing an opinion on the facts, as well as in those jurisdictions where the court may express an opinion on the facts, unless such provisions also expressly or impliedly forbid the summing up of the evidence.[212] Under this practice the court in charging the jury may sum up all the evidence in detail, if fairly done, and then state the rule of

[209] Sharp v. S. 105 Ga. 588, 31 S. E. 541.

[210] Davis v. S. 152 Ind. 34, 51 N. E. 928, 71 Am. St. 322.

[211] Blackstone Comm. 375.

[212] Blashfield Instructions, § 53 P. 130, citing: Mitchell v. Harmony, 13 How. (U. S.), 130; Starr v. U. S. 153 U. S. 614, 14 Sup. Ct. 919; P. v. Fanning, 131 N. Y. 663, 30 N. E. 569; S. v. Rose, 47 Minn. 47, 49 N. W. 525; Com. v. McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761; Hannon v. S. 70 Wis. 448, 36 N. W. 1; Morgan v. S. 48 Ohio St. 371; First Baptist Church v. Rouse, 21 Conn. 167; Donnilly v. S. 26 N. J. L. 480; District of Columbia v. Robinson, 180 U. S. 92, 21 Sup. Ct. 283; Hamlin v. Treat, 87 Me. 310, 32 Atl. 909; Bellow v. Ahrburg, 23 Kas. 287; City & S. R. Co. v. Findley, 76 Ga. 311 (and other cases); Com. v. Barry, 9 Allen Mass. 278; S. v. Sipsey, 14 N. Car. 485.

law applicable to the facts.[213] The rule applies to civil and criminal cases alike.[214] But in some jurisdictions this practice, though recognized, has been condemned.[215] Summarizing instructions as such, however, are not necessarily objectionable or vicious.[216]

An instruction thus summarizing the evidence must necessarily state all the facts or elements which, as a matter of law, will authorize the verdict directed. The contentions of the opposing party should not be ignored in summarizing instructions if there is any evidence tending to support his contention.[217] If such an instruction omits material facts it is highly objectionable. The very fact that the court gives what assumes to be a summary of the facts of a case may induce the jury to believe that they are all the facts necessary to be considered in arriving at a conclusion.[218] An instruction which thus undertakes to state all the material facts constituting a cause of action or defense, but omits a material fact, is fatally defective.[219] But a summarizing instruction is not erroneous in failing to state all the subsidiary or unimportant facts. It is sufficient if it enumerates all the material facts.[220]

It has been held in Pennsylvania that if the trial court in

[213] Morgan v. S. 48 Ohio St. 377, 27 N. E. 710; Medearis v. Anchor Mutual Fire Ins. Co. 104 Iowa, 88, 73 N. W. 495; Mimms v. S. 16 Ohio St. 234; Sheets v. Stark, 14 Ga. 429; York v. Maine C. R. Co. 84 Me. 128, 24 Atl. 791.

[214] Turly v. P. 188 Ill. 633, 59 N. E. 506; Gregg v. P. 98 Ill. App. 170.

[215] Terre Haute & I. R. Co. v. Eggman, 159 Ill. 550, 42 N. E. 970; City of Chicago v. Schmidt, 107 Ill. 186; Quinn v. P. 123 Ill. 333, 342, 15 N. E. 46.

[216] Norfolk Beet Sugar Co. v. Hight, 56 Neb. 162, 76 N. W. 566; White v. State, 153 Ind. 689, 54 N. E. 763.

[217] Pardridge v. Cutter, 168 Ill. 512, 48 N. E. 125; Texas Loan Agency v. Fleming (Tex. Cv. App.), 46 S. W. 63; Terre Haute & I. R. Co. v. Eggman, 159 Ill. 550, 42 N. E. 970; City of Chicago v. Schmitt, 107 Ill. 186; Chicago & N. W. R. Co. v. Snyder, 117 Ill. 376, 7 N. E. 604; St. Louis & S. R. Co. v. Britz, 72 Ill. 256, 261; McCorkle v. Simpson, 42 Ind. 453; Barker v. S. 48 Ind. 163; Snyder v. S. 59 Ind. 105; Ward v. Ward, 47 W. Va. 766, 36 S. E. 873; McAleer v. S. 46 Neb. 116, 64 N. W. 358; Kurstelska v. Jackson, 89 Minn. 95.

[218] Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499, 507; Levy v. Cunningham, 56 Neb. 348, 76 N. W. 882; Ford v. S. 75 Miss. 727, 23 So. 710; West v. Averill Grocery Co. 109 Iowa, 488, 80 N. W. 555; Gallagher v. Williamson, 23 Cal. 334, 83 Am. Dec. 114.

[219] Wyman v. Turner, 14 Ind. App. 118, 42 N. E. 652; Jackson School Tp. v. Shera, 8 Ind. App. 330, 35 N. E. 842; Dobson v. S. 61 Neb. 584, 85 N. W. 843.

[220] Hutchinson v. Wenzel, 155 Ind. 49, 56 N. E. 845; Illinois Cent. R. Co. v. Byrne, 205 Ill. 21, 68 N. E. 720.

summing up the evidence mistakes the testimony, counsel should call the attention of the court to the mistake immediately after the charge, and failing to do so, complaint in that respect will not be considered on review.[221] But the rule above mentioned does not apply to an instruction which merely fails to embody evidence tending to establish a distinct antagonistic theory. All the law requires is that such an instruction based upon some particular hypothesis warranted by the evidence must not omit any essential element or material fact to entitle a party to a recovery upon such theory.[222] But in most of the states the court is prohibited from commenting on the evidence, suggesting the inferences that may be drawn, expressing an opinion as to its weight, or assuming that certain facts have been proved.[223]

[221] Bailey v. Mill Creek Coal Co. 20 Pa. Super. 186.

[222] Springfield C. R. Co. v. Hoeffner, 175 Ill. 638, 51 N. E. 884; Terre Haute R. Co. v. Eggmann, 159 Ill. 550, 42 N. E. 970; Chicago & A. R. Co. v. Harrington, 192 Ill. 24, 61 N. E. 622; Voris v. Shotts, 20 Ind. App. 220, 50 N. E. 484.

[223] Fuller v. New York F. Ins. Co. (Mass.) 67 N. E. 879; Gaynor v. Louisville & N. R. Co. 136 Ala. 244, 33 So. 808; Ray v. Long, 132 N. Car. 891, 44 S. E. 652; Ward v. Brown, 53 W. Va. 227, 44 S. E. 488; Dodd v. Guiseffi (Mo. App.), 73 S. W. 304; Griffin v. Southern R. 66 S. Car. 77, 44 S. E. 562; Dobson v. Southern R. Co. 132 N. Car. 900, 44 S. E. 593; Continental Tob. Co. v. Knoop, 24 Ky. L. R. 1268, 71 S. W. 3; Wilson v. Huguenin, 117 Ga. 546, 43 S. E. 857; Ohio, &c. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; Abbitt v. Lake Erie, &c. R. Co. 150 Ind. 498, 50 N. E. 729; Rogers v. Manhattan, &c. Ins. Co. 138 Cal. 285, 71 Pac. 348; Selensky v. Chicago, &c. R. Co. 100 Iowa, 113, 94 N. W. 272; Lydick v. Gill (Neb.) 94 N. W. 109; McHenry v. Bulefant (Pa.) 56 Atl. 256; Northern Ohio R. Co. v. Rigby (Ohio), 68 N. E. 1046. Violations of the rule: Johnson v. Kahn, 97 Mo. App. 628, 71 S. W. 725; Allen v. Frost (Tex. Cv. App.), 71 S. W. 767; Meadows v. West. U. Tel. Co. 131 N. Car. 73 42 S. E. 534; Warfield v. Clark, 118 Iowa, 69, 91 N. W. 833; White v. McPherson, 183 Mass. 533, 67 N. E. 643. Rule not violated: Goldthorpe v. Clark-Nickerson L. Co. 31 Wash. 467, 71 Pac. 1091; Ladd v. Witte, 116 Wis. 35, 92 N. W. 365; Wissler v. Atlantic (Iowa), 98 N. W. 131; Snyder v. Lake Shore, &c. R. Co. (Mich.), 91 N. W. 643, Montgomery v. Del. Ins. Co. (S. Car.) 45 S. E. 934; Coombs v. Mason, 97 Me. 270, 54 Atl. 728; Schmuck v. Hill (Neb.), 96 N. W. 158.

CHAPTER IV.

DIRECTING VERDICT.

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§ 120. Peremptory instruction defined.—When the facts of a case are such that it becomes the duty of the court, as a matter of law, to determine what the verdict shall be, the jury are then

instructed by the court to find a verdict accordingly. In some states such a charge is called a peremptory instruction,[1] and in others it is called a "general affirmative charge."[1*] The court in thus charging the jury need not give any specific reasons for directing a verdict; it is sufficient to state that the evidence will not support any other verdict than the one directed.[2] The instruction should not be drawn in such form as to complicate it with statements of the law on which it is based.[3] And the court in directing a verdict should give no other instructions except as to the measure of damages.[4]

§ 121. **Nature and effect of motion for peremptory.**—A motion for a peremptory instruction is in the nature of a demurrer to the evidence and is governed by the same rules, except as to technical methods of procedure. The maker of the motion admits the truth of all the opposing evidence and all inferences which may be fairly and rationally drawn from it, and does not involve a determination of the weight of the evidence nor the credibility of the witnesses.[5] The party requesting such an

[1] Offutt v. Columbian Exposition, 175 Ill. 473, 51 N. E. 651; Illinois Cent. R. Co. v. King, 179 Ill. 94, 53 N. E. 552; West Chicago St. R. Co. v. Foster, 175 Ill. 396, 51 N. E. 690; Swift & Co. v. Fue, 167 Ill. 443, 47 N. E. 761; Wenona Coal Co. v. Holmquest, 152 Ill. 581, 38 N. E. 946.

[1*] Tennessee Coal, I. & R. Co. v. Stevens (Ala.), 16 So. 22; Henry v. McNamara, 114 Ala. 107, 22 So. 428; Louisville & N. R. Co. v. Sullivan (Ala.), 35 So. 327.

[2] Hanley v. Balch, 106 Mich. 46, 63 N. W. 981; Cowles v. Chicago, R. I. & P. Co. (Iowa), 88 N. W. 1072. Contra: Carretson v. Appleton, 58 N. J. L. 386, 37 Atl. 150; Tanderup v. Hansen, 8 S. Dak. 375, 66 N. W. 1073. See Robey v. S. 94 Md. 61, 51 Atl. 411.

[3] Thomas v. Carey, 26 Colo. 485, 58 Pac. 1093.

[4] City of Omaha v. Bowman, 63 Neb. 333, 88 N. W. 521. The following has been held sufficient in form for directing a verdict. "Now comes the defendants by their attorney and request the court to instruct the jury that the evidence is insufficient to maintain the plaintiff's case, as charged in the declaration, and therefore the verdict must be for the defendants." Ames & Frost Co. v. Shrackurski, 145 Ill. 192, 34 N. E. 48; Ayers v. City of Chicago, 111 Ill. 406. See Alexander v. Cunningham, 111 Ill. 511. A remark made by the court in the presence of the jury that any verdict except one for the plaintiff would be set aside by the court, amounts to an instruction directing a verdict for the plaintiff, White v. Blum 79 Fed. 271. The court in directing a verdict under the statute of Washington is not required to file its findings of facts and conclusions of law, Fidelity Trust Co. v. Palmer, 22 Wash. 473, 61 Pac. 158.

[5] Offutt v. Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 132, 22 N. E. 15; Frazer v. Howe, 106 Ill. 563, 573; Joliet, A. & N. R. Co. v. Velie, 140 Ill. 59, 29 N. E. 706; Chicago & A. R. Co. v. Adler, 129 Ill. 335, 21

instruction admits not only what the evidence actually proves, but also the ultimate facts which it tends to prove for his opponent.[6] In other words, the evidence of the opposing party must be taken as true in determining a motion for a peremptory instruction.[7]

And the same rules govern also where the defendant presents his motion to nonsuit the plaintiff, as he may under the practice in some jurisdictions, for the reason that the plaintiff's evidence does not prove a case. On a motion of this nature the evidence of the plaintiff shall be taken as true in a light most favorable to him.[8] The court will regard the issues proved if there is any evidence tending to prove them.[9] And all inferences which may be fairly drawn from the plaintiff's evidence shall be counted in his favor by the court in passing upon the motion for a nonsuit.[10]

§ 122. Court will not weight the evidence on the motion.—In considering the propriety of giving a peremptory instruction, when requested, the court does not weigh the evidence, nor does it determine the credibility of the witnesses or the force that should be given to the evidence having a tendency to impeach the veracity of the witnesses.[11] In deciding the motion the sole

N. E. 846; Bartelott v. International Bank, 119 Ill. 259, 269, 9 N. E. 898; Doane v. Lockwood, 115 Ill. 490, 494, 4 N. E. 500; Hardy v. Wise, 5 App. Cas. (D. C.) 108.

[6] Neininger v. Cowen, 101 Fed. 787; West C. St. R. Co. v. Shiplett, 85 Ill. App. 683.

[7] Kirk v. Garrett, 84 Md. 383, 35 Atl. 1089; Martin v. Chicago & N. W. R. Co. 194 Ill. 138, 62 N. W. 599; New York Dry Goods Store v. Pabst Brewing Co. 112 Fed. 381; Newbold v. Hayward, 96 Md. 247, 54 Atl. 67 (even though contradicted in every particular).

[8] Schiller v. Dry Dock, E. B. & B. R. Co. 56 N. Y. S. 184, 26 Misc. 392; Coley v. North Carolina R. Co. 129 N. Car. 407, 40 S. E. 195; Hopkins v. Norfolk & S. R. Co. 131 N. Car. 463, 42 S. E. 902; House v. Seaboard A. L. R. Co. 131 N. Car. 103, 42 S. E. 553; Kelly v. Strouse, 116 Ga. 872, 43 S. E. 280; Duffy v. St. Louis Tr. Co. (Mo. App.), 78 S. W. 831.

[9] Soyer v. Great Falls Water Co. 15 Mont. 1, 37 Pac. 838. See Howell v. Norfolk & C. R. Co. 124 N. Car. 24, 32 S. E. 317.

[10] Lee v. Publishers, &c. 137 Mo. 385, 38 S. W. 1107; Cummings v. Helena & L. S. R. Co. 26 Mont. 434, 68 Pac. 852; Bohl v. City of Dell Rapids (S. Dak.), 91 N. W. 315. See also Travelers' Ins. Co. v. Randolph, 78 Fed. 754; Howey v. Fisher, 111 Mich. 422, 69 N. W. 741; Wagner v. Lamont (Mich.), 98 N. W. 2.

[11] Rack v. Chicago C. R. Co. 173 Ill. 289, 50 N. E. 668, 44 L. R. A. 127; Luhrs v. Brooklyn Heights R. Co. 42 N. Y. S. 606; Platz v. McKean Tp. 178 Pa. St. 601, 36 Atl. 136; House v. Wilder, 47 Ill. 510; Davis v. Kroyden, 1 Mo. App. 192; Offutt v. Columbian Exposition, 175 Ill. 472,

inquiry will be whether there is any evidence tending to support the cause of action.[12] The court may in its discretion hear further evidence before passing on a motion for nonsuit.[13]

§ 123. Requesting peremptory instructions—Waiving.—In Illinois the practice is that an instruction directing the jury to find a verdict for a party must be reduced to writing, the same as other instructions, and it should be presented to the court at the proper time, accompanied by a motion that it be given to the jury; a mere motion without such instruction is not sufficient.[14] The right to have such an instruction given to the jury is waived where it is submitted to the court, together with a series of other instructions on the issues.[15] Where a statute requires the grounds for a peremptory instruction or nonsuit to be stated, the party will be confined to the grounds stated in his motion; other reasons will not be considered.[16] A motion by the defendant for a verdict in his favor on the ground that the plaintiff has not established his case by a preponderance of the evidence is not equivalent to a request for a verdict on the ground that there is no evidence to support a verdict for the plaintiff.[17]

§ 124. When motion for peremptory presented.—A peremptory instruction to find a verdict for the defendant must be presented

51 N. E. 651; Louisville & N. R. Co. v. Dick (Ky.), 78 S. W. 914; St. Louis, I. M. & S. R. Co. v. Neal (Ark.), 78 S. W. 220.

[12] Whaley v. Bartlett, 42 S. Car. 454, 20 S. E. 745.

[13] Featherston v. Wilson, 123 N. Car. 623, 31 S. E. 843.

[14] West C. St. R. Co. v. Foster, 175 Ill. 396, 51 N. E. 690; Swift & Co. v. Fue, 167 Ill. 443, 47 N. E. 761; Wenona Coal Co. v. Holmquest, 152 Ill. 581, 38 N. E. 946; Offutt v. Columbian Exposition, 175 Ill. 473, 51 N. E. 651. The practice of excluding the evidence amounts to an instruction as in a case of nonsuit, and is equivalent to an instruction that the evidence does not make out a case. This practice, though once in vogue, has long since been superseded by the more appropriate mode of instructing the jury to find a verdict for the party, Smith v. Gillett, 50 Ill. 301; House v. Wilder, 47 Ill. 510.

[15] Chicago, B. & Q. R. Co. v. Murowski, 179 Ill. 77, 53 N. E. 572; Chicago, P. & St. L. R. Co. v. Woolridge, 174 Ill. 332, 51 N. E. 701; Pierce v. Walters, 164 Ill. 560, 45 N. E. 1068; Baldwin v. Wentworth, 67 N. H. 408, 36 Atl. 365. In Alabama it has been held that the court is not precluded from directing a verdict for a party at his request, although the court has charged the jury on the issues, Gary v. Woodham, 103 Ala. 421, 15 So. 840.

[16] Sloan v. Petzer, 54 S. Car. 314, 32 S. E. 431.

[17] McDonald v. Minneapolis, St. P. R. Co. 105 Mich. 659, 63 N. W. 966.

to the court by proper motion at the close of the plaintiff's evidence.[18] Or the defendant may ask that such an instruction be given after he has introduced his own evidence; such practice being recognized by the courts, though it is unusual. But such an instruction can only be sustained when, as a matter of law, admitting all facts which the plaintiff's evidence tends to prove and wholly ignoring all the evidence introduced by the defendant the court can say the plaintiff has failed to make out his case.[19]

According to the practice in some jurisdictions, however, the court may recall the jury even after they have been deliberating upon the case and direct a verdict.[20] So also the court may at any time before the jury are discharged change an order of nonsuit, and direct a verdict for the defendant.[21]

[18] Chicago, B. & Q. R. Co. v. Murowski, 179 Ill. 77, 53 N. E. 572; Peirce v. Walters, 164 Ill. 560, 45 N. E. 1068; Chicago, P. & S. L. R. Co. v. Woolridge, 174 Ill. 330, 332, 51 N. E. 701; Baldwin v. Wentworth, 67 N. H. 408, 36 Atl. 365; Calumet St. R. Co. v. Van Pett, 173 Ill. 72, 50 N. E. 678; Gilbert v. Watts-De Golyer Co. 169 Ill. 129, 48 N. E. 430; Hartford Deposit Co. v. Pederson, 168 Ill. 224, 48 N. E. 30; Metropolitan Bank of Minneapolis v. Northern Fuel Co. 173 Ill. 345, 50 N. E. 1062; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178; Franklin v. Krum, 171 Ill. 378, 49 N. E. 513; Calumet St. R. Co. v. Christenson, 170 Ill. 383, 48 N. E. 962; Chicago & Great Western R. Co. v. Wedel, 144 Ill. 9, 12, 32 N. E. 547; West Chicago St. R. Co. v. Yund, 169 Ill. 49, 48 N. E. 208; Central R. Co. v. Knowles, 191 Ill. 241; Sullivan v. Brooks, 31 N. Y. S. 36, 10 Misc. 368; West Chicago St. R. Co. v. Feldstein, 169 Ill. 139, 48 N. E. 193; Chicago & N. W. R. Co. v. Delaney, 169 Ill. 581, 48 N. E. 476; West Chicago St. R. Co. v. Fishman, 169 Ill. 196, 48 N. E. 447; Vallette v. Bilinski, 167 Ill. 565, 47 N. E. 770; Lake Shore & M. S. R. Co. v. Richards, 152 Ill. 59, 72, 38 N. E. 773; Joliet, A. & N. R. Co. v. Velie, 140 Ill. 59, 29 N. E. 706; Travelers' Ins. Co. v. Randolph, 78 Fed. 754; Brunswick Grocery Co. v. Brunswick & W. R. Co. 106 Ga. 270, 32 S. E. 92.

[19] Collar v. Patterson, 137 Ill. 403, 406, 27 N. E. 604; Randall v. Baltimore & Ohio R. Co. 109 U. S. 478; Reed v. Inhabitants, 8 Allen (Mass.), 524; Bartolett v. International Bank, 119 Ill. 259, 269, 9 N. E. 898; Vanarsdell's Adm'r v. Louisville & N. R. Co. 23 Ky. L. R. 1666, 65 S. W. 858. But see McCormick v. Standard Oil Co. 60 N. J. L. 243, 37 Atl. 617. If no motion is made by the defendant to dismiss the case at the close of the introduction of the evidence, it amounts to an admission that the plaintiff's evidence is sufficient to make out his case and raises questions of fact for the jury, Rouse v. Printers' E. Co. 33 N. Y. S. 55, 12 Misc. 114; Sulyewski v. Windholz, 30 N. Y. S. 230, 9 Misc. 498.

[20] Rainger v. Boston M. Life Asso. 167 Mass. 109, 44 N. E. 1088. See Gary v. Woodham, 103 Ala. 421, 15 So. 840 (may request a peremptory after the court has charged the jury on the issues). The court should not direct a verdict on its own motion, Gaynor v. Louisville & N. R. Co. (Ala.), 33 So. 108.

[21] Portance v. Lehigh Val. Coal Co. 101 Wis. 574, 77 N. W. 875; Rainger v. Boston M. Life Asso. 167 Mass. 109, 44 N. E. 1088.

§ 125. Peremptory instruction instead of nonsuit.—Under statutory provisions in some states the court is not authorized to enter an order of involuntary nonsuit and judgment of dismissal because the plaintiff has failed to make out his case. In such case the proper practice is to instruct the jury to find for the defendant.[22]

§ 126. Peremptory instruction for defendant.—An instruction directing a verdict for the defendant should only be given when the evidence, with all the legitimate and natural inferences which may be drawn therefrom, is wholly insufficient, when taken as true, to sustain a verdict for the plaintiff.[23] When there is no evidence to support a verdict for the plaintiff a peremptory instruction to find for the defendant is proper. But to say there is no evidence does not mean literally none, but that there is none to reasonably satisfy the jury that the plaintiff has made out his case.[24] A verdict for the defendant should be directed if the court would be bound to set aside a verdict for the plaintiff.[25] So if the evidence so greatly preponderates against the plaintiff that the court would, on motion, be compelled to set aside a verdict, a nonsuit is proper where the practice of nonsuiting prevails.[26] The court is authorized to direct a ver-

[22] Thompson v. Missouri Pac. R. Co. 51 Neb. 527, 71 N. W. 61. See Stern v. Frommer, 30 N. Y. S. 1067, 10 Misc. 219.

[23] Lake S. & M. S. R. Co. v. Richards, 152 Ill. 72, 38 N. E. 773, 30 L. R. A. 33 note; Lake S. & M. S. R. Co. v. Hessions, 150 Ill. 559, 37 N. E. 905; Fugate v. City of Somerset, 97 Ky. 48, 29 S. W. 970; Springfield C. R. Co. v. Puntenney, 200 Ill. 12; Day v. Boston & M. R. (Me.), 55 Atl. 420; Offutt v. Columbian Exposition, 175 Ill. 472, 51 N. E. 651; Illinois Cent. R. Co. v. Cozby, 174 Ill. 109, 50 N. E. 1011; Pennsylvania Co. v. Backes, 133 Ill. 264, 24 N. E. 563; P. v. Board, &c. of Madison County, 125 Ill. 340, 17 N. E. 147; Roden v. Chicago & G. T. R. Co. 133 Ill. 72; Ruck v. Chicago C. R. Co. 173 Ill. 291 50 N. E. 668; Siddall v. Jansen, 168 Ill. 45, 48 N. E. 191; Chicago & E. I. R. Co. v. Chancellor, 165 Ill. 445, 46 N. E. 269; Baltimore & O. R. Co v. Stanley, 158 Ill. 396, 41 N. E. 1012; Amble v. Whipple, 139 Ill. 322, 28 N. E. 841; City of East St. L. v. O'Flynn, 119 Ill. 207, 10 N. E. 395; Ellerman v. St. Louis Tr. Co. (Mo. App.), 76 S. W. 661 (injury from trolley car collision).

[24] Offutt v. Columbian Exposition, 175 Ill. 472, 51 N. E. 651. See Conner v. Giles, 76 Me. 132; Boyle v. Illinois Cent. R. Co. 88 Ill. App. 255; Phillips v. Rentz, 106 Ga. 249, 32 S. E. 107; Knapp v. Jones, 50 Neb. 490, 70 N. W. 19; McPeck v. Central Vt. R. Co. 79 Fed. 590, 25 C. C. A. 110; Lacy v. Porter, 103 Cal. 597, 37 Pac. 635; Vance v. Vance, 74 Ind. 370; Sunsyside, &c. Co. v. Reitz, 14 Ind. App. 478, 500.

[25] De Graffeuried v. Wallace (Ind. Ter.), 53 S. W. 452; Brown v. Potter, 13 Colo. App. 512, 58 Pac. 785; McDonald v. Metropolitan St. R. Co. 61 N. Y. S. 817; Payne Clothing Co. v. Payne (Ky.), 54 S. W. 709; Howes v. District of Columbia, 2 App. Cas. (D. C.) 188.

[26] Cohn v. David Mayer Brewing

dict for either party where a contrary verdict could not be sustained by the evidence.[27]

If the plaintiff's evidence, including all inferences which may be fairly drawn therefrom, when taken as true, is not sufficient to make out a prima facie case a verdict for the defendant is proper.[28] And it has been held that unless the plaintiff makes out a prima facie case, not from his own evidence alone, but from the whole evidence, the court is authorized to direct a verdict for the defendant.[29] So it is proper to direct a nonsuit in those jurisdictions where such practice prevails, if the plaintiff's evidence fails to establish a prima facie case.[30] Although the plaintiff proves every fact or element essential to a recovery, yet if other facts are also proved, which clearly show that he is not entitled to a verdict, a nonsuit is proper.[31] For example, if the plaintiff sues on an account and proves his case as laid, but also proves that the debt has been fully paid, a nonsuit should be awarded. Under such state of facts he proves his case and then disproves it.[32]

If it appears that the plaintiff's evidence could not under any view of the law support his cause of action a verdict should be

Co. 56 N. Y. S. 293; Downing v. Murray, 113 Cal. 455, 45 Pac. 869; Wheatley v. Philadelphia, W. & B. R. Co. 1 Marv. (Del.), 305, 30 Atl. 660; Meyers v. Berch, 59 N. J. L. 238, 36 Atl. 95.

[27] Coleman v. Lord (Me.), 52 Atl. 645; Barnett v. Talbot, 90 Me. 229, 38 Atl. 112; Barnhart v. Chicago, M. & St. P. R. Co. 97 Iowa, 654, 66 N. W. 902; Reeder v. Dupuy, 96 Iowa, 729, 65 N. W. 338; Market & Fulton Nat. Bank v. Sargent, 85 Me. 349, 27 Atl. 192. See also Zimmerman v. Kearney County Bank (Neb.), 91 N. W. 497; Elsworth v. Newby (Neb.), 91 N. W. 517; White v. L. Hoster Brewing Co. 51 W. Va. 259, 41 S. E. 180; Kielbeck v. Chicago, B. & Q. R. Co. (Neb.), 97 N. W. 750; Truskett v. Bronaugh (Indian Ter.), 76 S. W. 294. Where there are several defendants and one has not been served and does not appear, the court is not authorized to direct a verdict as to him, but should dismiss without prejudice, Sanders v. Wettermark, 20 Tex. Cv. App. 175, 49 S. W. 900. And where some of several defendants have filed cross-complaints the court is not authorized to dismiss the cross complaints by a nonsuit of the plaintiff, Taylor v. Bartholomew (Idaho), 53 Pac. 325.

[28] Anders v. Life Ins. Co. 62 Neb. 585, 87 N. W. 331; Freemont Brewing Co. v. Hansen (Neb.), 91 N. W. 279; Barr v. Irey, 3 Kas. App. 240, 45 Pac. 111; Simrell v. Miller, 169 Pa. St. 326, 32 Atl. 548. See North C. St. R. Co. v. Cossar, 203 Ill. 611; Sattler v. Chicago, R. I. & P. R. Co. (Neb.), 98 N. W. 664.

[29] Preistly v. Provident Sav. Co. 117 Fed. 271.

[30] Congran v. Bigelow, 164 U. S. 301, 17 Sup. Ct. 117; Baker v. Johnson (Del.), 42 Atl. 449; Cummings v. Halena & L. S. R. Co. 26 Mont. 434, 68 Pac. 852.

[31] Evans v. Mills (Ga.), 46 S. E. 674.

[32] Evans v. Mills (Ga.), 46 S. E. 675.

directed for the defendant.[33] Or where the evidence is so clearly deficient as to give no support to a verdict for the plaintiff, if rendered in his favor, it should be excluded and a verdict directed for the defendant.[34] Or if the evidence for the plaintiff so clearly fails to make out a case that reasonable men could not differ, or no reasonable ground could exist for a difference of opinion among jurors as to the insufficiency of the evidence, a verdict should be directed for the defendant.[35]

When the controlling facts are admitted or not controverted in any essential respect the court may instruct the jury what their verdict should be.[36] So also the court is authorized to direct a verdict where there is no conflict in the evidence between the parties litigant.[37] So if from the undisputed evidence the court would be compelled to set aside a verdict then the court may direct a verdict.[38]

Where the admitted facts conclusively show that an action is barred by the statute of limitations a peremptory instruction for the defendant is proper.[39] If the testimony of the plaintiff himself shows that he has no cause of action a nonsuit is proper.[40]

[33] Chapman v. Yellow P. L. Co. 89 Fed. 903; Phœnix A. Co. v. Lucker, 77 Fed. 243; Fisher v. Porter, 11 S. Dak. 311, 77 N. W. 112. See also Collar v. Patterson, 137 Ill. 406, 27 N. E. 604; Randall v. Baltimore & O. R. Co. 109 U. S. 478; Reed v. Inhabitants, 8 Allen (Mass.), 524.

[34] Ritz v. City of Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; Cleveland, C. C. & St. L. R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; Hom v. Hutchinson, 163 Pa. St. 435, 30 Atl. 152; White v. Hoster B. Co. 51 W. Va. 259.

[35] Fisher v. Porter, 11 S. Dak. 311, 77 N. W. 112; Ritz v. City of Wheeling, 45 W. Va. 262, 31 S. E. 993, 43 L. R. A. 148; Rickards v. Bemis (Tex. Cv. App.) 78 S. W. 240.

[36] Wabash R. Co. v. Williamson, 104 Ind. 157, 3 N. E. 814; Hall v. Durham, 109 Ind. 434, 9 N. E. 926, 10 N. E. 581; Peoples & Drovers' Bank v. Craig, 63 Ohio St. 382, 59 N. E. 102.

[37] Soloman v. Trisarri, 9 N. Mex. 480, 54 Pac. 752; McCormick v. Standard Oil Co. 60 N. J. L. 243, 37 Atl. 617.

[38] Hurd v. Neilson, 100 Iowa, 555, 69 N. W. 867; Sax v. Detroit, G. H. & M. R. Co. (Mich.), 89 N. W. 368; Pennsylvania R. Co. v. Martin, 114 Fed. 586. Contra: Dick v. Louisville & N. R. Co. 23 Ky. L. R. 1068, 64 S. W. 725; Williams v. Belmont Coal & C. Co. (W. Va.), 46 S. E. 802.

[39] Exchange Bank v. Trumble, 108 Ky. 234.

[40] Smith v. Cohn, 170 Pa. St. 132, 32 Atl. 565. An error committed in denying a motion to dismiss at the close of the plaintiff's case for the want of sufficient evidence, will be regarded as cured where the evidence for the defendant afterwards supplies the deficiency of the plaintiff's evidence, O'Connell v. Samuel, 31 N. Y. S. 889, 81 Hun, 357; Cushman v. Carbondale Fuel Co. (Iowa), 88 N. W. 817. The court may cause a dismissal immediately after the opening statement of counsel for the plaintiff without

In case the plaintiff wholly fails to prove some one element essential to his right of recovery the court may properly direct a verdict for the defendant.[41] And for the same reason a nonsuit is proper. For instance, where negligence is an essential element of the plaintiff's case, and he fails to prove that element, a nonsuit is proper.[42]

§ 127. If plaintiff's evidence varies from his pleadings.—Where there is a variance between the plaintiff's pleadings and evidence it is proper to direct a verdict for the defendant, if the evidence also fails to prove a case for the plaintiff; and in such case it is not error to refuse leave to amend the pleadings.[43] Thus in an attachment suit where the evidence wholly fails to sustain the charge of fraudulent conveyance as alleged in the affidavit on which the action is based an instruction directing the jury to find for the defendant is proper.[44] So also a nonsuit is proper where the plaintiff proves a different cause of action than that alleged in his complaint or declaration.[45]

the introduction of evidence, if such opening statement, taken as true, fails to show a case for the plaintiff, Sims v. Metropolitan St. R. Co. 72 N. Y. S. 835, 65 App. Div. 270.

[41] Sack v. Dolese, 137 Ill. 138, 27 N. E. 62 (negligence); Bartelott v. International Bank, 119 Ill. 269, 9 N. E. 898; Abend v. Terre H. & I. R. Co. 111 Ill. 202; Alexander v. Cunningham, 111 Ill. 515; Ayer v. City of Chicago, 111 Ill. 406; Frazer v. Howe, 106 Ill. 573; Clark v. Stitt, 12 Ohio C. C. 759; Lacy v. Porter, 103 Cal. 597, 37 Pac. 635; Louisville, St. L. & T. R. Co. v. Terry's Adm'rx, 20 Ky. L. R. 803, 47 S. W. 588; Jackson v. Ferris (Pa.), 8 Atl. 435; Brehmer v. Lyman, 71 Vt. 98, 42 Atl. 613; Wilcox v. Willmington R. Co. 2 Pen. (Del.) 157, 44 Atl. 686; Phillip v. Rentz, 106 Ga. 249, 32 S. E. 107; Ohio & M. R. Co. v. Dunn, 138 Ind. 18, 37 N. E. 546; Dunnington v. Syfeers, 157 Ind. 458, 62 N. E. 29; Cogan v. Cass Ave. & F. G. R. Co. (Mo. App.) 73 S. W. 738.

[42] Daniels v. Leibig Mfg. Co. 2 Marv. (Del.) 207, 42 Atl. 447; Mt. Vernor Bank v. Porter, 148 Mo. 176, 49 S. W. 982; Cox v. Norfolk & C. R. Co. 123 N. Car. 604, 31 S. E. 848; Pace v. Harris, 97 Ga. 357, 24 S. E. 445. See Lyons v. Wayervoss A. L. R. Co. 114 Ga. 727, 40 S. E. 698.

[43] Strahle v. First Nat. Bank, 47 Neb. 319, 66 N. W. 415.

[44] Wadsworth v. Laurie, 164 Ill. 48, 45 N. E. 435. See Gilmore v. Courtney, 158 Ill. 437, 41 N. E. 1023. A motion for a peremptory instruction because of a variance between the pleadings and proof, to be of any avail on review, must specifically point out the variance, Probst Consolidation Co. v. Foley, 166 Ill. 31, 43 N. E. 750; Chicago C. R. Co. v. Carroll, 206 Ill. 327.

[45] Thill v. Hoyt, 56 N. Y. S. 78, 37 App. Div. 521; Case v. Central R. Co. 59 N. J. L. 471, 37 Atl. 65; Baker v. Johnson, 2 Marv. (Del.) 219, 42 Atl. 449. If a declaration is defective, the defect cannot be reached by a motion to instruct the jury to find a verdict for the defendant, Gerke v. Faucher, 158 Ill. 375, 382, 41 N. E. 982.

§ 128. If evidence shows contract to be illegal.—The fact that the transaction on which suit is brought was illegal, or that the action may be barred by the statute of limitations, is not sufficient reason for a nonsuit where such issue is raised by answer and reply. These are matters of defense.[46] But where the evidence conclusively shows that a suit is based on a gambling contract the court is authorized to direct a verdict.[47]

§ 129. Peremptory improper for defendant.—If there is any evidence, though slight, which tends to establish the plaintiff's case a peremptory instruction to find for the defendant is improper.[48] And if the natural and reasonable inferences which may be fairly drawn from the evidence tend to prove the plaintiff's case a general affirmative charge should not be given.[49]

[46] Fitch v. Bill, 71 Conn. 24, 40 Atl. 910.

[47] West v. Sanders, 104 Ga. 727, 31 S. E. 619.

[48] New York C. & St. L. R. Co. v. Luebech, 157 Ill. 604, 41 N. E. 897; West C. St. R. Co. v. Lyons, 157 Ill. 593, 42 N. E. 55; Chicago & N. R. Co. v. Snyder, 128 Ill. 655, 21 N. E. 520; Hartrich v. Hawes (Ill.), 67 N. E. 13; Agne v. Seitsinger, 96 Iowa, 181, 64 N. W. 836; P. v. People's Ins. Exchange, 126 Ill. 466, 18 N. E. 774; Wright Fire P. Co. v. Poezekai, 130 Ill. 139, 144, 22 N. E. 543; Lake S. & M. S. R. Co. v. Johnson, 135 Ill. 641, 649, 26 N. E. 510; Lake S. & M. S. R. Co. v. Brown, 123 Ill. 162, 185, 14 N. E. 197; Lake S. & M. S. R. Co. v. O'Conner, 115 Ill. 254, 261, 3 N. E. 501; Traveler's Ins. Co. v. Randolph, 78 Fed. 754; Harlen v. Baden (Kas.), 49 Pac. 615; Marx v. Hess, 19 Ky. L. R. 42, 39 S. W. 249; S. v. Spengler, 74 Miss. 129, 21 So. 4; Hurd v. Neilson, 100 Iowa, 555, 69 N. W. 867; Schmidt v. Chicago & N. W. R. Co. 90 Wis. 504, 63 N. W. 1057; Miller v. Howard, 19 Ky. L. R. 22, 39 S. W. 37; Meyers v. Birch, 59 N. J. L. 238, 36 Atl. 95; Hartford v. City of Attalla, 119 Ala. 59, 24 So. 845; Martin v. Chicago & N. W. R. Co. 194 Ill. 138, 146; Joliet R. Co. v. McPherson, 193 Ill. 629; Zeigler v. Pennsylvania Co. 63 Ill. App. 410; Consolidated L. & I. Co. v. Hawley, 7 S. Dak. 229, 63 N. W. 904; Pound v. Pound, 60 Minn. 214, 62 N. W. 264; Dietz v. Metropolitan L. I. Co. 168 Pa. St. 504, 32 Atl. 119; Rogers v. Brooks, 105 Ala. 549, 17 So. 97; Smart v. Hodges, 105 Ala. 634, 17 So. 22; Phillips v. Phillips, 93 Iowa, 615, 61 N. W. 1071; Chesapeake & N. R. Co. v. Ogles (Ky.), 73 S. W. 751; Morrow v. Pullman P. Car Co. (Mo. App.), 73 S. W. 281; Lee v. Gorham, 165 Mass. 130, 42 N. E. 556; Kearns v. Burling, 14 Ind. App. 143, 42 N. E. 646; Rogers v. Louisville & N. R. Co. 17 Ky. L. R. 1421, 35 S. W. 109; McKinney v. Hopwood, 46 Neb. 871, 65 N. W. 1055; Davis v. Hoxey, 2 Ill. (1 Scam.), 406; Van Etten v. Edwards, 47 Neb. 279, 66 N. W. 1013; Dirimple v. State Bank, 91 Wis. 601, 65 N. W. 501; Sexton v. Steele, 60 Minn. 336, 62 N. W. 392; McCrystal v. O'Neill, 86 N. Y. S. 84.

[49] Henry v. McNamara, 114 Ala. 107, 22 So. 428; Tennessee C. J. & R. Co. v. Stevens, 115 Ala. 461, 22 So. 80; New York C. & St. L. R. Co. v. Leubeck, 157 Ill. 604, 41 N. E. 897; West C. St. R. Co. v. Lyons, 157 Ill. 593, 42 N. E. 55; Florida C. & P. R. Co. v. Williams, 37 Fla. 406, 20 So. 558. It is error for the court to exclude proper evi-

§ 130. If the evidence tends to prove plaintiff's case.—If there is any evidence tending to support every element of the plaintiff's case it is improper and erroneous to direct a nonsuit, although the defendant may have set up new matter in defense which the plaintiff answered by replication.[50] The fact that there is no evidence to prove some one or more of the particulars of a case will not authorize the dismissal of the plaintiff's complaint, if his evidence supports a cause of action.[51] And if the evidence tends to support any one of the counts of the plaintiff's declaration an instruction to find a verdict for the defendant is properly refused, although some of the counts may not be sufficient to receive the evidence.[52] So if there is any evidence whatever tending to prove a cause of action a nonsuit is improper.[53]

§ 131. When facts are doubtful—Different conclusions.—If in the opinion of the court it is doubtful from the evidence whether the jury should be instructed to return a verdict for the defendant the doubt should be resolved in favor of submitting the case to the jury.[54] And where the case is doubtful the court is authorized to exercise its discretion.[55] Where it appears from the evidence that the defendant is not entitled to a verdict on the merits of the case it is error to direct a verdict in his favor, although the plaintiff's evidence is not sufficient to establish his case;[56] and where different conclusions might be drawn from

dence introduced by the plaintiff and direct a verdict for the defendant, Huff v. Cole, 45 Ind. 300.

[50] Hazy v. Woitke, 23 Colo. 556, 48 Pac. 1048. See Cleveland Axle Co. v. Zilch, 12 Ohio C. C. 578; Wells v. Snow (Cal.), 41 Pac. 858.

[51] Marden v. Dorthy, 42 N. Y. S. 827; Talbotton R. Co. v. Gibson, 106 Ga. 229, 32 S. E. 151; Sexton v. Steele, 60 Minn. 336, 62 N. W. 392; Seymore v. Rice, 94 Ga. 183, 21 S. E. 293.

[52] Illinois Cent. R. Co. v. Weiland, 179 Ill. 609, 613, 54 N. E. 300. See Taylor v. Corley, 113 Ala. 580, 21 So. 404.

[53] Norris v. Clinkscales (S. Car.), 22 S. E. 1; Drummond v. Nichols (S. Car.), 21 S. E. 322; Fitzwater v. Roberts, 116 Pa. St. 454, 31 Atl. 204; Howell v. New York, C. H. & R. R. Co. 73 N. Y. S. 994, 68 App. Div. 409; Davis v. Kent, 97 Ga. 275, 23 S. E. 88; Davidoff v. Wheeler & W. Mfg. Co. 37 N. Y. S. 661, 16 Misc. 31; Evans v. Mills (Ga.), 46 S. E. 675; Kroetch v. Empire Mill Co. (Idaho), 74 Pac. 868.

[54] Mexican Cent. R. Co. v. Murray, 102 Fed. 264; Howey v. Fisher, 111 Mich. 422, 69 N. W. 741. See Rinear v. Skinner, 20 Wash. 541, 56 Pac. 24.

[55] Ferguson v. Venice Tr. Co. 79 Mo. App. 352.

[56] Dennison v. Musgrave, 46 N. Y. S. 530, 20 Misc. 678.

the evidence by different minds the jury should determine the facts.[57]

§ 132. Where either of two theories is supported.—When the evidence is such that it tends to support two theories, one of which renders the defendant liable and the other not, the case should be submitted to the jury.[58]

§ 133. Evidence strongly against plaintiff.—It follows from what has been said that, although it may appear that the evidence tends strongly to show that the plaintiff has failed to prove the essential facts necessary to make out his case, yet the court is not authorized to take the case from the jury.[59] Hence the court should not direct the jury to find a verdict for the defendant on the ground that the evidence for the plaintiff does not preponderate in his favor.[60]

In New York the court has gone to the extent of holding that

[57] Sweet v. Chicago, M. & S. P. R. Co. 6 S. Dak. 281, 60 N. W. 77. According to the practice in Rhode Island it is discretionary with the court to give an instruction directing a verdict and no exception lies to the action of the court in giving or refusing such instruction, S. v. Collins (R. I.), 52 Atl. 990; Fillinghast v. McLeod, 17 R. I. 208, 21 Atl. 345.

[58] Voegeli v. Pickel Marble & G. Co. 56 Mo. App. 678; Workingmen's Banking Co. v. Blell, 57 Mo. App. 410.

[59] Padbury v. Metropolitan St. R. Co. 75 N. Y. S. 952, 71 App. Div. 616; Baker v. Irish, 172 Pa. St. 528, 33 Atl. 558; O'Brien v. Chicago & N. W. R. Co. 92 Wis. 340, 66 N. W. 363; Missouri M. Iron Co. v. Hoover, 179 Ill. 107, 53 N. E. 560; Chicago & A. R. Co. v. Eston, 178 Ill. 192, 195, 52 N. E. 954; Pittsburg, Ft. W. & C. R. Co. v. Callaghan, 157 Ill. 406, 409, 41 N. E. 909; Chicago & A. R. Co. v. Heinrich, 157 Ill. 388, 391, 41 N. E. 860; St. Louis, A. & T. H. R. Co. v. Bauer, 156 Ill. 106, 40 N. E. 448; National Syrup Co. v. Carlson, 155 Ill. 210, 40 N. E. 492; Wenona Coal Co. v. Holmquist, 152 Ill. 581, 38 N. E. 946; Rich & B. Malting Co. v. International Bank, 185 Ill. 422, 428, 56 N. E. 1062; Henry v. Stewart, 185 Ill. 448, 452, 57 N. E. 190; Chicago, &c. Foundry Co. v. Van Dam, 149 Ill. 338, 36 N. E. 1024; Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 31 N. E. 412; Ames & F. Co. v. Strachurski, 145 Ill. 192, 34 N. E. 48; Insurance Co. of N. A. v. Bird, 175 Ill. 42, 51 N. E. 686; Cleveland, C. C. & St. L. R. Co. v. Jenkins, 174 Ill. 398, 409, 51 N. E. 811; Illinois Cent. R. Co. v. Ashline, 171 Ill. 314, 320, 49 N. E. 921; North C. St. R. Co. v. Wiswel, 168 Ill. 613, 48 N. E. 407; Chicago & N. W. R. Co. v. Smith, 162 Ill. 185, 44 N. E. 390; Gerke v. Fancher, 158 Ill. 375, 383, 41 N. E. 982; Pennsylvania Coal Co. v. Conlan, 101 Ill. 105; American Strawboard Co. v. Chicago & A. R. Co. 177 Ill. 513, 53 N. E. 97; Brantley Co. v. Lee, 106 Ga. 313, 32 S. E. 101; Jenkins v. Louisville & N. R. Co. (Ky.), 47 S. W. 761; Richards v. Louisville & N. R. Co. 20 Ky. L. R. 1478, 49 S. W. 419; Platz v. McKean Tp. 178 Pa. St. 601, 36 Atl. 136; Heydrick v. Hutchinson, 165 Pa. St. 208, 30 Atl. 918.

[60] Mattoon v. Freemont, E. & M. V. R. Co. 6 S. Dak. 196, 60 N. W. 740.

the fact that the evidence preponderates so strongly in favor of the defendant that the court would set aside a verdict for the plaintiff as against the weight of the evidence, does not warrant the court in directing a verdict for the defendant.[61] Where the evidence is such that under any view that can be taken of it questions of fact are involved which must be determined by the jury, a binding or peremptory instruction is properly refused.[62]

§ 134. The foregoing principles illustrated.—In an action for personal injury if the plaintiff introduces any evidence tending to show the defendant to be guilty of negligence the court is not authorized to instruct the jury to return a verdict for the defendant.[63] Also in an action for the loss of goods through negligence in shipping, if there is any evidence tending to prove the negligence charged, a motion to find for the defendant should be denied.[64]

And in an action for killing stock, although the defendant's evidence has fully overcome the presumption of negligence from the fact of killing the stock, yet if the plaintiff's evidence in rebuttal raises a material conflict on the point, an instruction to find for the defendant is properly refused.[65] But if the evidence as to negligence is wholly speculative an instruction to find a verdict for the defendant is proper.[66] A nonsuit on the ground of contributory negligence will be denied, unless the evidence clearly shows that the plaintiff was guilty of negligence.[67]

In an action brought on a promissory note, given in settlement of disputed claims, it was held that the plaintiff was not entitled to have a verdict directed in his favor unless the facts

[61] Luhrs v. Brooklyn H. R. Co. 42 N. Y. S. 606, 11 App. Div. 173.

[62] Smith v. Easton Tr. Co. 167 Pa. St. 209, 31 S. W. 557.

[63] Weeks v. Southern R. Co. 119 N. Car. 740, 26 S. E. 124; Rickert v. Southern R. Co. 123 N. Car. 255, 31 S. E. 497; Central P. R. Co. v. Chatterson, 17 Ky. L. R. 5, 29 S. W. 18.

[64] Memphis & C. P. Co. v. Abell, 17 Ky. L. R. 191, 30 S. W. 658.

[65] Sheldon v. Chicago & M. & St. P. R. Co. 6 S. Dak. 606, 62 N. W. 955. See Robertson v. Illinois Cent. R. Co. (Miss.), 17 So. 235.

[66] Gerwe Consolidated Fire W. Co. 12 Ohio, C. C. 420.

[67] Mahnken v. Board of Chosen Freeholders, 62 N. J. L. 404, 41 Atl. 921.

essential to make the note valid are so apparent that reasonable men could not differ as to such facts.[68]

§ 135. Peremptory instructions for plaintiff.—The court may instruct the jury to find a verdict for the plaintiff where there is no evidence whatever tending to support a different verdict;[69] or where the evidence would not warrant a verdict otherwise than for the plaintiff.[70] And it has also been held that where the burden is on the defendant to establish his defense it is not error to take the case from the jury by directing a verdict, even before the defendant has rested his case, if his remaining evidence, with that already introduced, would not make out his defense.[71] The court may direct the jury to find a verdict for the amount sued for, subject to the court's opinion, on a demurrer to the evidence.[72]

§ 136. Prima facie case undisputed.—Where the plaintiff makes out a prima facie case, and the defendant introduces no evidence tending to dispute his claim or to establish a defense, it is proper to direct a verdict for the plaintiff.[73] Thus in a suit in ejectment if the plaintiff makes out a case by prima facie proof, and there is no rebutting evidence, his right to a verdict follows as a matter of law.[74] Also a verdict may be

[68] Morey v. Laird, 108 Iowa, 670, 77 N. W. 835.

[69] Anthony v. Wheeler, 130 Ill. 128, 132, 22 N. E. 624 (ejectment); Heinsen v. Lamb, 117 Ill. 549, 557, 7 N. E. 75; Caveny v. Weiller, 90 Ill. 159.

[70] Lancaster G. & C. Co. v. Murry G. S. Co. 19 Tex. Cv. App. 110, 47 S. W. 387; Gichrist v. Brown, 165 Pa. St. 275, 30 Atl. 839; McWaters v. Equitable Mort. Co. 115 Ga. 723, 42 S. E. 52; Concord-Williams Lumber Co. v. Warren Grain Co. 114 Ga. 966, 41 S. E. 41.

[71] Davis v. Holbrook, 25 Colo. 493, 55 Pac. 730. See also Jones v. Achey, 105 Ga. 493, 30 S. E. 810; McNeel v. Smith, 106 Ga. 215, 32 S. E. 119.

[72] Mathews Adm'rs v. Traders' Bank (Va.), 27 S. E. 609.

[73] Westside Auction House Co. v. Connecticut Mut. Life Ins. Co. 186 Ill. 156, 57 N. E. 839; Marshall v. John Grosse Clothing Co. 184 Ill. 421, 56 N. E. 807; Barrett v. Boddie, 158 Ill. 479, 42 N. E. 143; Solomon v. Yrisarri, 9 N. Mex. 480, 54 Pac. 752; Tidwell v. New South B. & L. Asso. 111 Ga. 807, 35 S. E. 648; Arabak v. Village of Dodge, 62 Neb. 591, 87 N. W. 358; Graham v. St. Louis, I. M. & S. R. Co. 69 Ark. 562, 65 S. W. 1048, 66 S. W. 344; Faircloth v. Fulghum, 97 Ga. 357, 23 S. E. 838. See also Kahrs v. Kahrs, 115 Ga. 288, 41 S. E. 649; Hazzard v. Citizens' Bank, 72 Ind. 130; Beckner v. Riverside, &c. 65 Ind. 468; Yankton F. Ins. Co. v. Freemont, E. & M. V. R. Co. 7 S. Dak. 428, 64 N. W. 514; Ketchum v. Wilcox (Kas.), 48 Pac. 446. Contra: Devine v. Murphy, 168 Mass. 249, 46 N. E. 1066; Hillis v. First Nat. Bank, 54 Kas. 421, 38 Pac. 565.

[74] Anderson v. McCormick, 129 Ill. 308, 309, 21 N. E. 803; Heinsen v. Lamb, 117 Ill. 549, 557, 7 N. E. 75.

directed for the plaintiff in a suit touching the title to real estate, where he shows a complete chain of title from the government to himself, there being no evidence in opposition to his deeds or documents proving his title.[75]

§ 137. **When defendant admits all allegations.**—And it is proper to direct a verdict for the plaintiff where the defendant, by his answer and evidence, admits all the allegations of the plaintiff's claim.[76]

§ 138. **When defendant's pleading is insufficient.**—The court may instruct the jury to find a verdict for the plaintiff in a case where the defense could not be shown under the general issue, and where the special pleas relied upon were properly held demurrable.[77]

§ 139. **When verdict cannot stand.**—And it has been held that a peremptory instruction should be given for the plaintiff where the evidence is such that the court would be bound to set aside a verdict for the defendant as being against the weight of the evidence.[78]

§ 140. **Improper for plaintiff—If any evidence for defendant.** The plaintiff is not entitled to a peremptory instruction if there is any evidence, though slight, tending to support the defense set up by the defendant.[79]

§ 141. **If the evidence is conflicting.**—Where the evidence which would sustain or defeat a recovery is conflicting, the question is for the jury, and the giving of a peremptory instruction to find a verdict for the defendant is error.[80] A nonsuit is also

[75] Quinn v. Eagleston, 108 Ill. 248, 255; Los Angeles Farming & Milling Co. v. Thompson, 117 Cal. 594, 49 Pac. 714.

[76] Gifford v. Ammer, 7 Kas. App. 365, 54 Pac. 802. See Stephens v. Koken Barber S. Co. 67 Mo. App. 587.

[77] Moore v. Prussing, 165 Ill. 319, 324, 46 N. E. 184.

[78] Reading Braid Co. v. Stewart, 43 N. Y. S. 1129, 19 Misc. 431. See Decker v. Sexton, 43 N. Y. S. 167, 19 Misc. 59.

[79] Minnesota Thresher Mfg. Co. v. Wolfram, 71 Wis. 809, 71 N. W. 809; Dooley v. Gorman, 104 Ga. 767, 31 S. E. 203; Weatherford v. Strawn, 8 Kas. App. 206, 55 Pac. 485; Forst v. Leonard, 116 Ala. 82, 22 So. 481; Mixon v. Warren, 94 Ga. 688, 21 S. E 714; Shoninger v. Latimer, 165 Pa. St. 373, 30 Atl. 985; Lau v. Fletcher, 104 Mich. 295, 62 N. W. 357.

[80] Hargraves v. Home Fire Ins. Co. 43 Neb. 271, 61 N. W. 611; Leiser v. Kieckhefer, 95 Wis. 4, 69 N. W. 979; Lewellen v. Patton, 73 Mo. App. 472; Thornton v. Perry, 105 Ga. 837,

improper, although the testimony of the plaintiff's witnesses may seem to be inconsistent, contradictory or conflicting.[81]

§ 142. If part only of plaintiff's claim is contested.—The plaintiff is not entitled to have a verdict directed in his favor where the defendant, by his evidence, contests only a part of the claim for which suit was brought;[82] or where one of several persons against whom suit is brought as a firm makes defense and contests the claim of the plaintiff a verdict should not be directed for the plaintiff.[83]

§ 143. Where amount of claim is disputed.—The court is not authorized to direct a verdict for the plaintiff if there is any dispute as to the amount due him.[84]

§ 144. Waving right to peremptory instruction.—If the defendant introduces evidence on his side of the case after the court has overruled his motion, made at the close of the plaintiff's evidence, for a verdict in his favor, he thereby waives the right to submit a peremptory instruction, and will not be heard to complain of error in that respect unless he renews the former motion at the close of all the evidence.[86] Likewise where a mo-

31 S. E. 797; Crawford v. Wittish, 4 Pa. Super. 585; McNight v. Bell, 168 Pa. St. 50, 31 Atl. 942; Lever v. Foote, 31 N. Y. S. 356, 82 Hun (N. Y.) 392; Leob v. Huddleston, 105 Ala. 257, 16 So. 714; McQuown v. Thompson, 5 Colo. App. 466, 39 Pac. 68; Mayer v. Thompson B. Co. 104 Ala. 611, 16 So. 620; Marx v. Hess, 19 Ky. L. 42, 39 S. W. 249; Rogers v. Kansas C. & O. R. Co. 52 Neb. 86, 71 N. W. 977; Swanson v. Menominee, E. L. R. & P. Co. 113 Mich. 603, 71 N. W. 1098.

[81] Crowe v. House of Good Shepherd, 56 N. Y. S. 223; Cohn v. David Mayer Brewing Co. 56 N. Y. S. 293; Cook v. Morris, 66 Conn. 196, 33 Atl. 994; Larkin v. Burlington, C. R. & N. R. Co. 91 Iowa, 654, 60 N. W. 195; Pacific M. L. Ins. Co. v. Fisher, 109 Cal. 566, 42 Pac. 154; Reilly v. Atlas I. C. Co. 38 N.Y. S. 485, 3 App. Div. 363.

[82] Carter v. Fischer, 127 Ala. 52, 28 So. 376; Talbotton R. Co. v. Gibson. 106 Ga. 229, 32 S. E. 157; Wilber Lumber Co. v. Oberbeck Bros. Mfg. Co. 96 Wis. 383, 71 N. W. 605.

[83] McKissack v. Witz, 120 Ala. 412, 25 So. 21.

[84] Brown v. Baird, 5 Okla. 133, 48 Pac. 180.

[86] Baltimore & O. S. R. Co. v. Alsop, 176 Ill. 474, 52 N. E. 253, 752; Hamilton Keeling Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893; Lynch v. Johnson, 109 Mich. 640, 67 N. W. 908; Young v. West Va. C. & P. R. Co. 42 W. Va. 112, 24 S. E. 615; Vanderhorst Brewing Co. v. Armhine (Md.), 56 Atl. 834; Totten v. Burhans, 103 Mich. 6, 61 N. W. 58; Bell v. Sheriden, 21 D. C. 370; American C. Ins. Co. v. Heiserman, 67 Fed. 947; Goss v. Calkins, 162 Mass. 492, 39 N. E. 469; Freese v. Kemplay, 118 Fed. 428 (the failure to move for a verdict is an admission that there is sufficient evidence to go to the jury); Hansen v. Boyd, 161 U. S. 397, 16 Sup. Ct. 571. In some jurisdictions the defendant may renew his motion for

tion for a nonsuit is overruled the defendant waives the right to claim error as to such ruling by introducing his evidence after the court has thus ruled.[87]

But in the State of Washington it has been held that if the defendant's evidence, together with that of the plaintiff in rebuttal, in no manner strengthens the plaintiff's case, then the motion for a nonsuit must be given force; and, therefore, the defendant, by proceeding with his evidence, waives his right to claim error in the court's ruling only to the extent of allowing the plaintiff any benefit he may derive from the evidence introduced after the overruling of the motion for a nonsuit.[88] And where there are two defendants an instruction directing the jury to find in favor of one of them is waived by the other, unless he objects, and excepts to the court's ruling.[89]

§ 145. Motion by both parties—Effect.—If each of the parties at the close of the evidence moves the court to direct a verdict in his favor then the finding of the court in passing upon the motions is conclusive, unless the evidence is wholly insufficient to support the conclusion.[90] Or if the plaintiff asks the court for a peremptory verdict in his favor and the defendant moves for a nonsuit, they both consent that the facts shall be determined by the court;[91] and in such case the finding of the court in favor of one of the parties settles the facts in favor

a verdict in his favor at the close of the entire evidence, Baltimore & O. R. Co. v. Alsop, 176 Ill. 471, 474, 52 N. E. 253, 752; Hannton Keeling Co. v. Wheeler, 175 Ill. 514, 51 N. E. 893; Harris v. Shebeck, 151 Ill. 287, 292, 37 N. E. 1015.

[87] Thompson v. Avery, 11 Utah, 214, 39 Pac. 829; Western U. Tel. Co. v. Thorn, 67 Fed. 287; Ratliff v. Ratliff (N. Car.), 42 S. E. 887; Jones v. Warren (N. Car.), 46 S. E. 740.

[88] Matson v. Port Townsend, S. R. Co. 9 Wash. 449, 37 Pac. 705. Compare Cushman v. Carbondate Fuel Co. (Iowa), 88 N. W. 817.

[89] Pioneer Fire Proof C. Co. v. Hansen, 176 Ill. 100, 52 N. E. 17. Where the defendant's plea is one of set-off, and he moves for a verdict in his favor, he thereby abandons his plea and is not put to its proof, Garcia v. Candelaria, 9 N. M. 374, 54 Pac. 342.

[90] Stearns v. Farrand, 60 N. Y. S. 501, 29 Misc. 292; Shreyer v. Jordan, 61 N. Y. S. 889, 30 Misc. 764; Northam v. International Ins. Co. 61 N. Y. S. 45; Mascott v. National Fire Ins. Co. 69 Vt. 116, 37 Atl. 255; Signa Iron Co. v. Brown, 171 N. Y. 488, 64 N. E. 194; Merwin v. Magone, 70 Fed. 776; Magone v. Origet, 70 Fed. 778. Contra: Thompson v. Brerman, 104 Wis. 564, 80 N. W. 947; German Sav. Bank v. Bates' Add. S. Co. (Iowa), 82 N. W. 1005.

[91] Guenther v. Amsden, 44 N. Y. S. 982; McGuire v. Hartford Fire Ins. Co. 158 N. Y. 680, 52 N. E. 1134; Smith v. Weston, 34 N. Y. S. 557, 88 Hun, 25; Fogarty v. Hook,

of the judgment.[92] Also if both of the parties agree that the jury may be dismissed and a verdict rendered by the court, this is equivalent to both asking the court to direct a verdict, and is an admission by the parties that only questions of law are involved to be determined by the court.[93]

Where each of the parties moves for a verdict in his favor, if the party whose motion is denied does not thereupon ask to have the case submitted to the jury the verdict directed by the court for the other party shall stand as the finding of the jury.[94] And in such case if the party whose motion is thus denied desires to have the case submitted to the jury he must state the specific questions he wishes submitted; he cannot ask to have the case submitted generally to the jury on all questions.[95] But where both parties move for a verdict in order to submit to the court some particular matter only, such as a question of notice, this act does not amount to a waiver of the right to have the facts of the case submitted to the jury. The court, under such circumstances, is not authorized to direct a verdict.[96] And the court is not authorized, over objection, to direct a verdict where the plaintiff moves for a verdict and the defendant for a dismissal in a case where the question of damages is involved, it being the duty of the jury to determine the damages.[97]

§ 146. Waiving right to submit facts to jury.—The right to have the facts submitted to a jury is waived where each party moves for a verdict in his favor.[98] Or if the plaintiff moves

32 N. Y. S. 555, 84 Hun, 165; Grogan v. U. S. Industrial Ins. Co. 36 N. Y. S. 687, 90 Hun, 521.

[92] Martin v. Home Bank, 160 N. Y. 190, 54 N. E. 717.

[93] Cutter v. Parsons, 43 N. Y. S. 187.

[94] Pickett v. Metropolitan Life Ins. Co. 46 N. Y. S. 693; Thompson v. Simpson, 128 N. Y. 270, 28 N. E. 627; First Nat. Bank v. Hayes, 64 Ohio St. 101, 59 N. E. 893; Beuttell v. Magone, 157 U. S. 154; Clason v. Baldwin, 152 N. Y. 204, 46 N. E. 322; Mascott v. Insurance Co. 69 Vt. 116, 37 Atl. 255.

[95] Groves v. Acker, 33 N. Y. S. 406, 85 Hun, 492. See Switzer v. Norton, 38 N. Y. S. 350, 3 App. Div. 173; Campbell v. Prague, 39 N. Y. S. 558, 6 App. Div. 554. In such case the defeated party will be regarded as having submitted all controverted questions of fact to the court for determination. First M. E. Church v. Fadden, 8 N. Dak. 162, 77 N. W. 615.

[96] University Press v. Williams, 62 N. Y. S. 986.

[97] Litt v. Wabash R. Co. 64 N. Y. S. 108, 54 App. Div. 550.

[98] Cleason v. Baldwin, 152 N. Y. 204, 46 N. E. 322; New England M. S. Co. v. Great W. & E. Co. 6 N. Dak. 407, 71 N. W. 130; Angier v. Western Ass. Co. 10 S. Dak. 82, 71

for a verdict and the defendant for a nonsuit they both waive the right to submit the facts to the jury.[99]

§ 147. Motion of both parties denied—Effect.—Where the court denies the motions of both parties to direct a verdict, and thereupon submits a single issue of fact to the jury, error may be assigned for a failure to submit the whole case, if the party complaining shall have properly taken exceptions to the action of the court.[100]

§ 148. Directing jurors to agree.—The court is authorized to direct a juror that he must agree with the other jurors in a case where, in the judgment of the court, a peremptory verdict should be rendered; and on refusal, the juror may subject himself to punishment for contempt of court.[101]

§ 149. Ruling of trial court reviewable.—The action of the trial court in refusing to give to the jury an instruction directing them to find a verdict may be reviewed on appeal or writ of error, where the ruling of the trial court is properly preserved in the record by a bill of exceptions.[102] In order to make the ruling of the trial court the subject of review on appeal or writ of error the party complaining must, at the proper time, present a written instruction, asking that the court direct a verdict in his favor.[103] The ruling of the trial court on a motion for a nonsuit, as to some particular point, will not be considered by a court of review on appeal, unless the attention of the trial court was called to the precise point contended for.[104] The

N. W. 761; Winter v. Williamsbaugh S. Bank, 74 N. Y. S. 140, 68 App. Div. 193; Westervelt v. Phelps, 171 N. Y. 212, 63 N. E. 962. Contra: Poppitz v. German Ins. Co. 88 Minn. 118, 88 N. W. 438.

[99] Page v. Shainwald, 65 N. Y. S. 174, 52 App. Div. 349; Blass v. Ferry, 34 N. Y. S. 475, 87 Hun, 563. Contra: Wilson v. Commercial Union Ins. Co. 15 S. Dak. 322, 89 N. W. 649. See Clark v. Clark, 36 N. Y. S. 294, 91 Hun, 295.

[100] Signa Iron Co. v. Green, 88 Fed. 207.

[101] Cahill v. Chicago, M. & St. P. R. Co. 74 Fed. 285; Grimes Drygoods Co. v. Malcolm, 164 U. S. 483, 17 Sup. Ct. 158, 58 Fed. 670.

[102] Gall v. Beckstein, 173 Ill. 187, 50 N. E. 711; Illinois Cent. R. Co. v. Nowicki, 148 Ill. 29, 35 N. E. 358.

[103] West C. St. R. Co. v. McCallum, 169 Ill. 241, 48 N. E. 424; Vallette v. Bleniski, 167 Ill. 565, 47 N. E. 770; Peirce v. Walters, 164 Ill. 561, 565, 45 N. E. 1068.

[104] Jackson v. Consolidated Tr. Co. 59 N. J. L. 25, 35 Atl. 75.

action of the trial court will not be reviewed if the motion is too general.[105]

§ 150. Criminal cases—Peremptory proper for defendant.—In a criminal case if there is no evidence tending to convict the accused, or if the evidence is so weak that a conviction could only be attributable to passion or prejudice, then it is proper to direct the jury to acquit the accused.[106] The court should not submit a case to the jury where a verdict of guilty would be palpably or flagrantly against the evidence.[107] Where there is no evidence whatever that the crime charged was committed in the county of the indictment it is error for the court to refuse to instruct that if the jury believe the evidence they must find him not guilty.[108]

§ 151. When not proper for defendant.—But where the evidence, though wholly circumstantial, shows a state of facts disclosing motive, threats or conduct of the defendant tending to prove his guilt, an instruction requesting that the jury be directed to find him not guilty is properly refused.[109] In other words, where the weight of the evidence tends to support the offense charged in the indictment a motion for a peremptory instruction to find the defendant not guilty should be overruled.[110]

[105] Kafka v. Levensohn, 41 N. Y. S. 368, 18 Misc. 202; Weber v. Germania F. Ins. Co. 44 N. Y. S. 976; Hartley v. Mullane, 45 N. Y. S. 1023, 20 Misc. 418.

[106] S. v. Couper, 32 Ore. 212, 49 Pac. 959; S. v. Feisher, 32 Ore. 254, 50 Pac. 561; Com. v. Yost, 197 Pa. St. 171, 46 Atl. 845. But see P. v. Streuber, 121 Cal. 431, 53 Pac. 918; P. v. Daniels, 105 Cal. 362, 38 Pac. 720.

[107] Com. v. Hall, 18 Ky. L. R. 783, 38 S. W. 498; S. v. Bartlett (Mo.), 71 S. W. 149; P. v. Bennett, 49 N. Y. 137; S. v. Flanagan (W. Va.), 35 S. E. 862; Baker v. S. 31 Ohio St. 314. See S. v. Brown, 119 N. Car. 789, 26 S. E. 121.

[108] Harvey v. S. 125 Ala. 47, 27 So. 763; Bailey v. S. 116 Ala. 437, 22 So. 918. By statute in California the court may, if it deems the evidence to be insufficient to warrant a conviction, advise the jury to acquit, but the court is not authorized to instruct the jury that there is no evidence to sustain a conviction, P. v. Daniels, 105 Cal. 362, 38 Pac. 720. In Indiana if it appears that the crime was committed, but in another county, the court must arrest the proceedings and certify the case to that county for trial, Burns' R. S. 1901, § 1900; Welty v. Ward (Ind.), 72 N. E. 596.

[109] S. v. Hallock, 70 Vt. 159, 40 Atl. 51; Com. v. Williams, 171 Mass. 461, 50 N. E. 1035; S. v. Wilson, 10 Wash. 402, 39 Pac. 106 (facts stated); Ter. v. Padilla (N. Mex.), 71 Pac. 1084; S. v. Hyde, 22 Wash. 551, 61 Pac. 719.

[110] Com. v. Brooks, 164 Mass. 397, 41 N. E. 660; S. v. Green,

§ 152. Peremptory proper for prosecution—When.—The court may properly direct the jury to find for the prosecution on the issues of once in jeopardy and former acquittal where it clearly appears that the first information was fatally defective in that it contained no allegation whatever as to the ownership of the property charged to have been taken by robbery, and the information was dismissed after the jury was impanelled but before any evidence was offered.[111] And on the merits in one state it has been held that it is the duty of the court to direct the jury to return a verdict of guilty where the undisputed facts in evidence warrant a conviction.[112]

117 N. Car. 695, 23 S. E. 98; Crawford v. Com. 18 Ky. L. R. 16, 35 S. W. 114; Com. v. Foster (Ky.), 61 S. W. 271; S. v. Utley, 126 N. Car. 997; S. v. Costner (N. Car.), 37 S. E. 326; Com. v. George, 13 Pa. Super. 542; Gott v. P. 187 Ill. 261, 58 N. E. 293.

[111] P. v. Ammerman, 118 Cal. 23, 50 Pac. 15.

[112] P. v. Elmer, 109 Mich. 493, 67 N. W. 550.

CHAPTER V.

LAW DETERMINED BY THE COURT.

Sec.
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§ 153. **Jury bound by law given by the court.**—In the absence of specific constitutional or statutory provisions expressly empowering the jury to determine both law and facts the principle that the court shall determine the law and the jury the facts, in both civil and criminal cases, has become firmly established.[1] And even in those jurisdictions where the jury are authorized to determine the law, as well as the facts, it is the duty of the court to fully instruct the jury as to the law. Thus in Missouri, although the constitution of that state, in an action for libel, provides that the jury shall be the judges of the law and the facts

[1] Sparf v. U. S. 156 U. S. 51, 15 Sup. Ct. 273 (a well considered case reviewing a long line of decisions, and eminent text writers).

the court is not divested of the right to fully instruct them as to the law of the case.[2]

So in Illinois, under a statutory provision that in all criminal cases the jury shall be the judges of the law as well as the fact, it is the duty of the jury to receive and act upon the law as given them by the court, and they are not warranted in disregarding it unless they can say upon their oaths that they know the law better than the court does.[3] The rule that the court must determine the law and instruct the jury accordingly is so familiar and has been so often decided by the courts that the citation of authorities seems unnecessary.[4] And it is the duty of the jury to be governed by the law as given them by the court.[5] The jury are bound to accept and apply the law as laid down by the court, and while they have the power to disregard it, yet in doing so they violate their oaths.[6]

§ 154. Court should not belittle the law.—The court in charging the jury should not criticise or condemn the law.[7] Any remark made by the court as to the law in charging the jury, having a tendency to cause the jury to disregard or discredit any of the instructions, to the prejudice of a party, is error.[8] To tell the jury that common sense is their "best guide", amounts

[2] Jones v. Murray, 167 Mo. 25, 66 S. W. 981; Heller v. Pulitzer Pub. Co. 153 Mo. 203, 54 S. W. 457.

[3] Wohlford v. P. 148 Ill. 301, 36 N. E. 107; Schnier v. P. 23 Ill. 11; Davison v. P. 90 Ill. 221.

[4] Henderson v. Henderson, 88 Ill. 248; Mitchell v. Town of Fond du Lac, 61 Ill. 176; S. v. Cough, 111 Iowa, 714, 83 N. W. 727; Drake v. S. 60 Ala. 62; Whitney v. Cook, 53 Miss. 531; Albert v. Besel, 88 Mo. 150; Vocke v. City of Chicago, 208 Ill. 194; Byers v. Thompson, 66 Ill. 421; Gehr v. Hagerman, 26 Ill. 442; Gilbert v. Bone, 79 Ill. 345; P. v. Ivey, 49 Cal. 56; Riley v. Watson, 18 Ind. 291; P. Ex. rel. Bibb, 193 Ill. 309, 61 N. E. 1077; Matthews v. S. 55 Ala. 65; Hyde v. Town of Swanton, 72 Vt. 242, 47 Atl. 790; Toledo, St. L. & R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089; Wabash St. L. & P. R. Co. v. Jaggerman, 115 Ill. 411, 4 N. E. 641.

[5] Moore v. Hinkle, 151 Ind. 343, 50 N. E. 822; Com. v. Anthes, 5 Gray (Mass.), 185; Adams v. S. 29 Ohio St. 412; Com. v. McManus, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761; Brown v. Com. 86 Va. 466, 472, 10 S. E. 745; Carpenter v. P. 8 N. Y. (8 Barb.), 603.

[6] S. v. Matthews, 38 La. 795. See P. v. Worden, 113 Cal. 569, 45 Pac. 844.

[7] Clifford v. S. 56 Ind. 245; Stebbins v. Keene Tp. 55 Mich. 552, 22 N. W. 37.

[8] Horton v. Williams, 21 Minn. 187; Head v. Bridges, 67 Ga. 227; Cone v. Citizens' Bank, 4 Kas. App. 470, 46 P. 414. See Roberts v. Neal, 62 Ga. 163; McCord v. S. 83 Ga. 521, 10 S. E. 437.

to telling them that common sense is superior to law in determining the guilt or innocence of the accused.[9]

§ 155. Submitting legal questions to jury improper.—As a general rule the giving of instructions which submit legal propositions to the jury for their determination is error.[10] But when a question of law has been erroneously submitted to the jury by instructions, and they decide it correctly, the error is harmless.[11] Under the rule mentioned it is the duty of the court to determine what allegations in the pleadings are material and necessary to be proved, this being a question of law.[12] Hence an instruction that the plaintiff must prove all the material allegations of his declaration is erroneous, in that it requires the jury to determine what are the material allegations;[13] but error committed in this respect may become harmless where other instructions in the charge clearly and plainly state the material issues to be determined by the jury.[14]

But an instruction referring to the declaration and stating that "if the jury find from the evidence that the plaintiff has made out her case as laid in her declaration then the jury must find for the plaintiff", is not subject to the criticism, that it makes the jury the judges of the effect of the averments of the declaration; it merely empowers them to determine whether the evidence introduced sustains the issues

[9] Wright v. S. 69 Ind. 165; Densmore v. S. 67 Ind. 306. See Clifford v. S. 56 Ind. 245; Kennedy v. Bebout, 62 Ind. 363.

[10] P. v. Mayor, &c. 193 Ill. 309. 61 N. E. 1077, 56 L. R. A. 95; Toledo, St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089; Wabash, St. L. & P. R. Co. v. Jaggerman, 115 Ill. 407, 411, 4 N. E. 641; Bullock v. Narrott, 49 Ill. 62, 65; Reno v. Wilson, 49 Ill. 95, 98; Marsh v. Smith, 49 Ill. 396, 399; Davis v. Kenaya, 51 Ill. 170; Mitchell v. Town of Fond du Lac, 61 Ill. 174, 176; Gilbert v. Bone, 79 Ill. 341, 345; Gehr v. Hageman, 26 Ill. 438, 442; Fink v. Evans, 95 Tenn. 413, 32 S. W. 307; Merrill v. Packer, 80 Iowa, 542, 45 N. W. 1076; Miller v. Dunlap, 22 Mo. App. 97.

[11] Comfort v. Bollingal, 134 Mo. 281, 289, 35 S. W. 609; Woodman v. Chesney, 39 Me. 45; Morse v. Weymouth, 28 Vt. 824; Knoxville, C. G. & L. R. Co. v. Beeler, 90 Tenn. 548, 18 S. W. 391; Martineau v. S. 14 Wis. 373.

[12] Endsley v. Johns, 120 Ill. 469, 477, 12 N. E. 247; Toledo, St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089.

[13] Martensen v. Arnold, 78 Ill. App. 336; Chicago T. Tr. R. Co. v. Schmelling, 99 Ill. App. 577, 64 N. E. 714; Toledo, St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089; Endsley v. Johns, 120 Ill. 469, 477, 12 N. E. 247.

[14] Endsley v. Johns, 120 Ill. 477, 12 N. E. 247; Toledo, St. L. & K. C. R. Co. v. Bailey, 145 Ill. 159, 33 N. E. 1089.

made by the pleadings.[15] So where the declaration charges negligence in violation of a city ordinance an instruction that if the jury believe from the evidence, that the plaintiff, while in the exercise of ordinary care, was injured by the negligence of the defendant, as charged in the declaration, they should find for plaintiff, is not objectionable as submitting to the jury for their determination the applicability of the ordinance to the circumstances of the case.[16]

§ 156. Court interprets written instruments.—Where papers or writings of any kind, such as contracts, deeds, mortgages, ordinances, by-laws, statutes, records or other documentary evidence of any nature or character require construction, it is the duty of the court, as a matter of law, to instruct the jury as to the meaning of them. It is the exclusive province of the court to interpret written instruments affecting the rights of the parties; and where two instruments between the same parties, conveying different interests in the subject matter in litigation are admissible in evidence, the court must determine the force and effect of each, and whether the execution of the one is inconsistent with the delivery of the other.[17]

It is the province of the court to interpret written contracts and define what is and what is not within their terms; for when the parties have assented to definite terms, and incorporated them in formal documents the meaning can be discovered on inspection.[18] It would be a dangerous principle to establish where parties have reduced their contracts to writing and defined the meaning by plain and unequivocal language, to subject their interpretation to the arbitrary and capricious judgment of persons unfamiliar with legal principles and settled rules of construction.[19] Whether a contract is an entire one is a question

[15] Laflin R. P. Co. v. Tearney, 131 Ill. 322, 325, 23 N. E. 389.

[16] Pennsylvania Co. v. France, 112 Ill. 398, 403.

[17] Robbins v. Spencer, 121 Ind. 594, 22 N. E. 660; H. G. Olds Wagon Co. v. Coombs, 124 Ind. 62, 24 N. E. 589. See Comer v. Himes, 49 Ind. 482; Thompson Tr. §§ 1065, 1066; Carlisle v. S. (Tex. Cr. App.), 56 S. W. 365; Brady v. Cassidy, 104 N. Y. 155, 10 N. E. 131; Daly v. Kimball Co. 67 Iowa, 132, 24 N. W. 756; Wason v. Rowe, 16 Vt. 525; Glover v. Gasque (S. Car.), 45 S. E. 113; Pitcairn v. Philip Hiss Co. (C. C. A.), 125 Fed. 110.

[18] McKenzie v. Sykes, 47 Mich. 294, 11 N. W. 164; Tompkins v. Gardner, 69 Mich. 58, 37 N. W. 43; Merrill v. Packer, 80 Iowa, 543, 45 N. W. 1076; Kingsbury v. Thorp, 61 Mich. 216 (partnership contract), 28 N. W. 74; Seller v. Johnson, 65 N. Car. 104.

[19] Brady v. Cassidy, 104 N. Y.

of law for the court to determine.[20] The court must also determine and explain to the jury the legal effect of contracts or other documentary evidence.[21] In charging the jury on an issue as to whether there was a contract between the parties the court should instruct what would constitute such contract.[22] Whether a correspondence carried on between the parties constitute a contract or not must be determined by the court, and not by the jury.[23]

§ 157. Jury interpret oral contracts.—Whether an oral contract has been made between parties, and what are its terms, are always questions of fact to be settled by the jury. But where the existence and terms of a contract have been established, its construction is a matter of law for the court.[24] Where a contract is by parol the terms of the agreement are, of course, matters of fact, and if those terms be obscure or equivocal, or are susceptible of explanation from extrinsic evidence, it is for the jury to find also the meaning of the terms employed; but the effect of a parol agreement, when its terms are given and their meaning fixed, is as much a question of law as the construction of a written contract.[25] In cases of written contracts it is the duty of the court to define the meaning of the language used in them, but in verbal contracts such duty is confined to the

147, 155, 10 N. E. 131; Bryant v. Hagerty, 87 Pa. St. 256; Estes v. Boothe, 20 Ark. 590; Comfort v. Ballingal, 134 Mo. 289, 35 S. W. 609; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 8 N. E. 654; Harvey v. Vandegrift, 89 Pa. St. 346; Zenor v. Johnson, 107 Ind. 69, 7 N. E. 751; Warren v. Chandler, 98 Iowa, 237, 67 N. W. 242; Olds Wagon Works v. Coombs, 124 Ind. 62, 24 N. E. 589; S. v. Williams, 32 S. Car. 123, 10 S. E. 876; Knoxville, C. G. & L. R. Co. v. Beeler, 90 Tenn. 549, 18 S. W. 391; Fairbanks v. Jacobs, 69 Iowa, 265, 28 N. W. 602; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; Cohn v. Stewart, 41 Wis. 527.

[20] Diefenback v. Stark, 56 Wis. 463, 14 N. W. 621.

[21] Libby v. Deake, 97 Me. 377, 54 Atl. 856; Barton v. Gray, 57 Mich. 622, 24 N. W. 638; Stribling v. Prettyman, 57 Ill. 377 (certificate of the register); Salem, M. & M. R. Co. v. Anderson, 51 Minn. 829.

[22] Boltz v. Miller, 23 Ky. L. R. 991, 64 S. W. 630. See generally on construction: Mantz v. Maguire, 52 Mo. App. 137; Jones v. Swearingen, 42 S. Car. 58, 19 S. E. 947; McHenry v. Man, 39 Md. 510; Sellars v. Johnson, 65 N. Car. 104; Burke v. Lee, 76 Va. 386; Lapeer Co. F. & M. F. Ins. Co. v. Doyle, 30 Mich. 159 (construction of insurance policy turning on whether a word was "six" or "oix").

[23] Lea v. Henry, 56 Iowa, 662, 10 N. W. 243; Battershall v. Stephens, 34 Mich. 68; Luckhart v. Ogden, 30 Cal. 548; Goddard v. Foster, 17 Wall (U. S.), 123.

[24] Snolley v. Hendrickson, 29 N. J. L. 371. See Edwards v. Goldsmith, 16 Pa. St. 48.

[25] Belt v. Goode, 31 Mo. 128.

jury. They are not merely to ascertain the words and forms of expression, but to interpret their sense and meaning.[26]

The question whether a contract existed must be determined from the oral proof, from what the parties said and did, and the matter is single and cannot be separated so as to refer one part to the jury and the other part to the court, but in its entirety the question is one of fact.[27] And the question as to what the contract really was between the parties is for the jury.[28] But after the jury shall have determined what the oral contract is, if any exists, it is the duty of the court, and not the jury, to determine its legal effect as a question of law.[29] The court submits to the jury the determination of the contract by hypothetical instructions, and declares the legal effect according to the finding of the jury.

Where the pleadings set out questions of law and fact the court must submit to the jury only the questions of fact.[30]

§ 158. Wills are construed by the court.—All questions touching the construction, operation and effect of wills are also to be determined by the court, and not by the jury.[31] Whether a will contains a special trust, which requires the joint action of all the executors, is a question of law for the court to decide, and not a question of fact to be referred to the jury for their decision.[32]

[26] Herbert v. Ford, 33 Me. 90, 93; Copeland v. Hall, 29 Me. 93; Walthelm v. Artz, 70 Iowa, 609, 31 N. W. 953; Chichester v. Whiteleather, 51 Ill. 259.

[27] McKenzie v. Sykes, 47 Mich. 294, 11 N. W. 164; Sines v. Superintendent, 55 Mich. 383, 21 N. W. 428. See Boyce v. Martin, 46 Mich. 239 (whether altered by parol), 9 N. W. 265; Codding v. Wood, 112 Pa. St. 371, 3 Atl. 455; Smith v. Hutchinson, 83 Mo. 683; Walthelm v. Artz, 70 Iowa, 609, 31 N. W. 953.

[28] Hughes v. Tanner, 96 Mich. 113, 55 N. W. 661; Smalley v. Hendrickson, 29 N. J. L. 373; Folsom v. Plumer, 43 N. H. 469; Tobin v. Gregg, 34 Pa. St. 446.

[29] Diefenback v. Stark, 56 Wis. 462, 14 N. W. 621; Young v. Jeffreys, 20 N. Car. 220; Barton v. Gray, 57 Mich. 623, 24 N. W. 638.

[30] Duren v. Kee, 41 S. Car. 171, 19 S. E. 492.

[31] Burke v. Lee, 76 Va. 386; Magee v. McNeil, 41 Miss. 17; S. v. Patterson, 68 Me. 473; Roe v. Taylor, 45 Ill. 485; Collins v. Green, 28 N. Car. 139; Willson v. Whitefield, 38 Ga. 269.

[32] Willson v. Whitefield, 38 Ga. 269, 283. Other documentary evidence is governed by the same rule. Deeds: Bonney v. Monell, 52 Me. 255; Hancock v. Colrybark, 66 Mo. 672; Huth v. Carondelet, 56 Mo. 207; Dean v. Erskine, 18 N. H. 81; Eddy v. Chase, 140 Mass. 471, 5 N. E. 306; Symmes v. Brown, 13 Ind. 318. Court records: Shook v. Blount, 67 Ala. 301 (decree); Gallup v. Fox, 64 Conn. 491, 30 Atl. 756 (construction); Turner v. First Nat. Bank, 78 Ind. 19 (construction); S. v. Anderson, 30 La. Ann. 557.

§ 159. Writing as a fact in chain of evidence.—It frequently happens that a writing is introduced merely as a fact or circumstance tending to prove some other fact. In such case it is generally but a link in a chain of evidence, the accompanying evidence being mostly, or altogether, oral. When such is the case the jury have to pass upon the whole transaction, of which the writing is but a part. The question then is, not so much what the document means, but what inference shall be drawn from its meaning, and what effect it shall have towards proving the point at issue. The writing and all the concomitant evidence go to the jury together. In such case the duty of the court is comparatively unimportant. It may pronounce what meaning the writing is, or is not, capable of, and whether it is, or is not, relevant to the issue; still the value and effect of such evidence is a question of fact for the jury.[33] So when a document is introduced in evidence as a foundation of an inference of fact to establish some other fact, whether such inference can be drawn from it, is a question for the jury.[34] In other words, where the question to be determined from a writing is not the construction of it, but its effect as collateral evidence, then the question is for the jury.[35]

§ 160. Some phases of writing explained by oral evidence. There is a large class of writings where the meaning of particular words or phrases or characters or abbreviations must be shown in evidence outside of the writing, and there may be extrinsic circumstances of one kind or another affecting its interpretation which may be shown by oral testimony. And it has often been inaccurately said that in cases of this kind the writing itself is to be passed upon and construed by the jury. Strictly speaking, this is not so. The jury find what the oral testimony shows, and the court declares what the writing means in the light of the facts found by the jury. The facts may be found by a special verdict, and then the court interprets the writing in view of such finding, or the case may go to the jury with hypothetical instructions from the court to render a ver-

[33] S. v. Patterson, 68 Me. 473; Wilson v. Board, &c. 63 Mo. 142.

[34] Prim v. Haren, 27 Mo. 205; Mantz v. Maguire, 52 Mo. App. 137.

[35] Reynolds v. Richards, 14 Pa. St. 205; Robbins v. Spencer, 121 Ind. 594, 22 N. E. 660; Thompson Tr. §§ 1065, 1066.

dict if certain facts are found, and another way if the facts are found differently. The court may first inform the jury as to the law, or the jury may first inform the court as to the facts, as may be most practicable.[36]

§ 161. Validity of ordinances and statutes for court.—It is the province of the court, and not the jury, to construe an ordinance when it is introduced in evidence.[37] The validity of an ordinance is a question for the court to determine, and not the jury.[38] An ordinance of a city, is to be proved by evidence addressed to the court, and not submitted as a fact to be determined by the jury.[39] So whether a statute shall be declared void for uncertainty, is a question of law for the court to determine, and not the jury.[40]

§ 162. Foreign law a fact to be proved.—When the laws of another state come in question in the courts they must be pleaded and proved as a matter of fact and determined by the jury.[41] That the law of another state is a fact to be determined by the jury is a well established principle.[42] But in such case it becomes the duty of the court, as in the case of any other

[36] S. v. Patterson, 68 Me. 473. Citing: Hutchinson v. Bowker, 5 M. & W. 535, 540; Smith v. Faulkner, 12 Gray (Mass.), 251, 255; Putnam v. Bond, 100 Mass. 58; Cunningham v. Washburn, 119 Mass. 224; Mowry v. Stogner, 3 Rich (S. Car.) 251; Powers v. Cary, 64 Me. 9, 21. See also Olds Wagon Co. v. Coombs, 124 Ind. 62 (contract ambiguous), 24 N. E. 589; Brady v. Cassidy, 104 N. Y. 147, 10 N. E. 131; Burke v. Lee, 76 Va. 386; Mantz v. Maguire, 52 Mo. App. 137; Foster v. Berg, 104 Pa. St. 328; Goddard v. Foster, 17 Wall (U. S.) 142; Meyer v. Shamp, 51 Neb. 424, 71 N. W. 57; West v. Smith, 101 U. S. 263; Helmholz v. Everingham, 24 Wis. 266; Kendrick v. Cisco, 13 Lea (Tenn.), 248; Philibert v. Burch, 4 Mo. App. 470, (doubtful words must be determined by the jury); Zenor v. Johnson, 107 Ind. 69; Humes v. Bernstein, 72 Ala. 546.

[37] Platt & S. v. Chicago, B. & Q. R. Co. 74 Iowa, 127, 37 N. W. 107; Sadler v. Peoples, 105 Fed. 712.

[38] City of Peoria v. Calhoun, 29 Ill. 317; Pennsylvania Co. v. Frana, 13 Ill. App. 91.

[39] Ronlo v. Valcour, 58 N. H. 346; Washington S. R. Co. v. Lacey, 94 Va. 460, 26 S. E. 834.

[40] S. v. Main, 69 Conn. 123, 37 Atl. 80, 36 L. R. A. 623 (statutes construed by the court); Post v. Supervisors, 105 U. S. 667; Gallatin Turnpike Co. v. S. 16 Lea (Tenn.), 36.

[41] Williams v. Finlay, 40 Ohio St. 342; Ely v. James, 123 Mass. 36, 44; Kline v. Baker, 99 Mass. 253; Lockwood v. Crawford, 18 Conn. 361; Hooper v. Moore, 50 N. Car. 130.

[42] Alexander v. Pennsylvania Co. 48 Ohio St. 623, 634, 30 N. E. 69. See Thompson Tr. § 1054; Wear v. Sanger, 91 Mo. 348, 2 S. W. 307; Moore v. Gwynn, 27 N. Car. (5 Ired. L.) 187; Bank v. Barry, 20 Md. 287.

documentary evidence requiring construction, to construe the statutes or decisions of the foreign state.[43] When foreign laws are in evidence it is no less the duty of the court to determine the law of the case from them than it is the court's duty to declare our own laws in charging the jury.[44] "What is the law of another state or of a foreign country, is as much a 'question of law', as what is the law of our own state. There is this difference, however: the court is presumed to know judicially the public laws of our state, while in respect to private laws and the laws of other states and foreign countries, this knowledge is not presumed; it follows that the existence of the latter must be alleged and proved as facts."[45]

§ 163. Illustrations of the principles — Legal questions. Whether the plaintiff or defendant has the affirmative on a particular issue is a question of law for the court, and not of fact for the jury.[46] The court may, without invading the province of the jury, instruct that two or more different writings introduced in evidence are not necessarily inconsistent in meaning in reference to some particular fact in issue.[47] Also an instruction which merely refers to certain documents involved in a case, stating that they are to be considered and construed together as part of one and the same contract, is not obnoxious as conveying the idea that the jury are authorized to construe the contract.[48]

An instruction that if the jury find that a certain person (naming him), "by reason of having hired the team, wagon and driver from the defendant had become, as it were, the owner thereof for that day" the defendant would not be responsible for any injury caused by the negligence of the driver of the team, is properly refused. The question thus submitted is

[43] Alexander v. Pennsylvania Co. 48 Ohio St. 623, 634, 30 N. E. 69; Ely v. James, 123 Mass. 36, 44; Cobb v. Griffin & A. Co. 87 Mo. 90.

[44] Slaughter v. Metropolitan St. R. Co. 116 Mo. 269, 23 S. W. 760; S. v. Whittle, 59 S. Car. 297, 37 S. E. 923.

[45] Hooper v. Moore, 50 N. Car. (5 Jones), 130.

[46] Gilbert v. Bone, 79 Ill. 341, 345.

[47] Home Friendly Soc. v. Berry, 94 Ga. 606, 21 S. E. 583.

[48] Anglo American Provision Co. v. Prestiss, 157 Ill. 506, 518, 42 N. E. 157. Held submitting to the jury questions of law in the following cases: Jordan v. Duke (Ariz.), 36 Pac. 896; Pearce v. Boggs, 99 Cal. 340, 33 Pac. 906.

one of law for the court.[49] It is error for the court to charge that the jury may apply certain instructions "so far as they are practicable in arriving at a verdict;" such charge submits to the jury the question of determining the law.[50] Submitting to the jury the questions as to what is "legal possession" and "color of title" is improper, they being questions of law for the court to determine.[51] To instruct the jury that if they believe the defendant was in actual possession of the land in controversy at the time the plaintiff purchased and took a conveyance of it, without advising them what would constitute actual possession, is error in requiring the jury to determine the law.[52]

In an action where the plaintiff's title to a tract of land was in issue a charge that if the plaintiff is the owner and entitled to the possession of the land the jury should find for him; and if the defendant wrongfully entered and wrongfully withheld the land they should assess damages, is erroneous in that it makes the jury judges of the law as well as the facts.[53] An instruction charging that the paper title introduced by the plaintiff is regular on its face, and with the proof of heirship is sufficient to vest title in him to the land in controversy, is proper, and does not invade the province of the jury in weighing the evidence.[54]

Whether a rule adopted in conducting or carrying on a certain business, such, for instance, as railroad business, is reasonable or not is a question of law for the court, and not for the jury, to determine.[55] Also the question of the obligation of a railroad company to fence its track is a question of law, and should not be submitted to the jury.[56] Whether certain clauses in an instrument as to the description of property are repugnant or not is a question of law to be determined by the court.[57] And the sufficiency of the description of property in a deed, mortgage or other instrument is a question of law.[58]

[49] Tompkins v. Montgomery, 123 Cal. 219, 55 Pac. 997.

[50] Duthie v. Town of Washburn, 87 Wis. 231, 55 N. W. 380.

[51] Blanchard v. Pratt, 37 Ill. 243.

[52] Mayes v. Kenton, 23 Ky. L. R. 1052, 64 S. W. 728.

[53] Smith v. Cornett, 18 Ky. L. R. 818, 38 S. W. 689; Ferguson v. Moore, 98 Tenn. 342, 39 S. W. 341.

[54] Howell v. Hanrick (Tex. Cv. App.), 24 S. W. 823.

[55] Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 423.

[56] Illinois Cent. R. Co. v. Whalen, 42 Ill. 396.

[57] Rathbun v. Geer, 64 Conn. 421, 30 Atl. 60.

[58] Austin v. French, 36 Mich. 199.

What is a proper execution and acknowledgment of a mortgage is a question of law, and hence improper to be submitted to the jury by instruction.[59] Where there can be no controversy as to what facts are established by the constitution and by-laws of an association, in evidence, it is the duty of the court, and not the jury, to determine whether the association was organized for an unlawful purpose.[60] A charge that "the records and papers which have been introduced in evidence are sufficient proof of the establishment of a public highway in accordance with the plat therein set forth," is proper, it being the duty of the court to determine the sufficiency of the records to sustain the road.[61] Where an instruction states that if the jury believe from the evidence that the act complained of was a lawful act, the defendant is not guilty, it submits to the jury a question of law.[62]

In an action for trespass, where the defense was justification under a replevin writ, an instruction submitting to the jury the question whether the writ was duly and properly executed, without informing them what would constitute a "due and proper" execution is improper.[63] Whether a warrant issued for the arrest of a person is valid or void is a question of law, and when such document is introduced in evidence the court may properly state to the jury whether it is or is not void.[64] The record of extradition proceedings is properly passed upon by the court for the purpose of determining as a matter of law whether the accused was extradited upon the same charge for which he was placed on trial.[65] Where by statutory provision a court is authorized to take judicial notice of the laws of nature and the measure of time, it is proper to instruct the jury as to the time when the moon rose on a particular day, although no evidence was introduced on that subject at the trial.[66] So also the court may instruct on what day of the week a certain day of the month occurred.[67]

[59] Bullock v. Narrott, 49 Ill. 62.
[60] Johnson v. Miller, 63 Iowa, 529, 17 N. W. 34.
[61] S. v. Prine, 25 Iowa, 231.
[62] Carr v. S. 104 Ala. 4, 16 So. 150.
[63] Gusdorff v. Duncan, 94 Md. 160, 50 Atl. 57.
[64] S. v. Yourex, 30 Wash. 611, 71 Pac. 203.
[65] S. v. Roller, 30 Wash. 692, 71 Pac. 718.
[66] P. v. Mayes, 113 Cal. 618, 45 Pac. 860.
[67] Koch v. S. 115 Ala. 99, 22 So. 471.

§ 164. Illustrations of the principles—Questions of fact.—An instruction stating that whether a certain act amounts to negligence is for the jury to determine under all the circumstances in evidence is not objectionable as requiring the jury to decide a question of law where the charge contains a legal definition of negligence.[68] Where a writing is introduced in evidence for the purpose of showing some extrinsic or collateral fact, and its effect does not depend upon the construction or meaning of the instrument, or of its effect upon some other instrument, the inference of fact is to be drawn by the jury.[69]

Where a memorandum or document on its face does not of itself purport to be a promise to pay or other binding obligation, but which requires parol evidence to disclose the intention of the maker of it, the jury must determine from all the facts and circumstances for what purpose the same was made.[70] The court will not decide as a matter of law whether a way of a certain width is necessary to the construction of a road on which to run or operate lumber trains. This is a question for the jury to determine.[71] The court after having defined probable cause in an action for malicious prosecution does not submit to the jury both the law and the facts by further charging them that "both the question of probable cause and malice are for the jury to determine" from the evidence.[72]

§ 165. In criminal causes court determines law.—In most, if not all, jurisdictions where the jury are not clothed with power by constitutional or statutory provision to determine the law they are bound to accept it as given them by the court, in criminal as well as civil cases.[73] It is the duty of the court to instruct

[68] Conner v. Citizens' St. R. Co. 146 Ind. 430, 45 N. E. 662.

[69] Robbins v. Spencer, 121 Ind. 594, 22 N. E. 660, citing: Thompson Tr. §§ 1065, 1066.

[70] Murphy v. Murphy, 95 Iowa, 271, 63 N. W. 697.

[71] Waters v. Greenlief John Lumber Co. 115 N. Car. 648, 20 S. E. 718.

[72] Lewton v. Hower, 35 Fla. 58, 16 So. 616.

[73] Duffy v. P. 26 N. Y. 588, 591; Hamilton v. P. 29 Mich. 173; Hannum v. S. 90 Tenn. 647, 18 S. W. 269; S. v. Rheams, 34 Minn. 18, 24 N. W. 302; Sparf v. U. S. 156 U. S. 51, 15 Sup. Ct. 273 (exhaustive review of cases and authorities); Adams v. S. 29 Ohio St. 412; S. v. Dickey, 48 W. Va. 325, 37 S. E. 695; S. v. Crotean, 23 Vt. 14; S. v. Stevens, 53 Me. 548; Washington v. S. 63 Ala. 135; Pierce v. S. 13 N. H. 536, 545; Harrison v. Com. 123 Pa. St. 508, 16 Atl. 611; Brown v. Com. 86 Va. 466, 10 S. E. 745; S. v. Burpee, 65 Vt. 1, 25 Atl. 964, 19 L. R. A. 145.

the jury as to the law in criminal cases, and it is the duty of the jury to follow the law as stated by the court.[74] Under the statute of California, which requires the jury to receive the law as laid down as such by the court, an instruction in substance charging that the jury should receive the law as the court states it to be, notwithstanding "you may firmly believe" the court is wrong, and that the law is, or should be, otherwise than as given by the court, is proper.[75] Doubtless, however, the jury have the power to disregard the law as given by the court, but they have neither the moral nor legal right to do so, and they cannot do so without violating their oaths and disregarding their duty.[76]

The doctrine that the jury are the judges of the law in criminal cases is contrary to the fundamental law; contrary to a vast preponderance of judicial authority in this country, and contrary to the spirit and meaning of the constitution of the United States.[77] The controversy in England over the question whether jurors are judges of the law originated largely from the course of procedure in prosecutions for libel. The judges in such cases were accustomed to direct the jury to return a verdict of guilty upon proof of publication and the truth of the inuendoes, without instructing them as to whether the paper, if they so found, was or was not libel. The question of malicious intent charged in the indictment was not submitted to the jury.[78]

§ 166. Jury made judge of law by statute.—By either constitutional or statutory provisions of several of the states the jury are made the judges of the law and the facts in all criminal cases.[79] Hence the jury are not absolutely bound to accept the law as given them by the court. In Illinois under a statute which provides that "juries in all criminal cases shall be judges

[74] Brown v. Com. 86 Va. 466, 472, 10 S. E. 745; Com. v. McManus, 143 Pa. St. 64, 21 Atl. 1018; Carpenter v. P. 8 Barb. (N. Y.) 603; Robbins v. S. 8 Ohio St. 167; Com. v. Anthes, 5 Gray (Mass.), 198.

[75] P. v. Worden, 113 Cal. 569, 45 Pac. 844.

[76] Parrish v. S. 14 Neb. 61, 63, 15 N. W. 357; U. S. v. Keller, 19 Fed. 633, 636.

[77] S. v. Wright, 53 Me. 328.

[78] S. v. Burpee, 65 Vt. 1, 21, 25 Atl. 964, 19 L. R. A. 145.

[79] McCarthy v. S. 56 Ind. 203; Broll v. S. 45 Md. 359; Com. v. Anthes, 71 Mass. (5 Gray), 185; S. v. Buckley, 40 Conn. 246; S. v. Thomas, 47 Conn. 546; Malone v. S. 66 Ga. 540; S. v. Ford, 37 La. Ann. 443, 465.

of the law and the fact," while it is the duty of the jury to receive and act upon the law as given by the court they are not bound to do so if they believe upon their oaths the court is wrong.[80]

In Indiana, under a constitutional provision which declares that "in all criminal cases whatever, the jury shall have the right to determine the law and the fact," while it is the duty of the jury to give careful and respectful consideration to the instructions of the court, and not disregard such instructions except for some good and sufficient reason, yet they have the right to determine the law for themselves.[81] In view of this provision the refusal of an instruction "that the jury in this case are the exclusive judges of the law and facts" was held to be error.[82] The jury may disregard the court's instructions and follow their own convictions, but they should give respectful consideration to the law as given by the court, especially if they are in doubt as to what is the law.[83] The decisions of the Supreme Court are no more binding on the jury in a criminal case than the instructions of the trial court.[84]

§ 167. **In Massachusetts and Connecticut.**—The statute of Massachusetts which provides that "in all criminal offenses it shall be the duty of the jury to try, according to the established forms and principles of law, all cases which shall be committed to them, and after having received the instructions of the court to decide at their discretion by a general verdict both the fact and the law involved in the issue, or to return a special verdict at their election," has been construed as not conferring on the jury the power to determine questions of law against the instructions of the court. Such power under the constitution of that state cannot be conferred upon the jury.[85]

In Connecticut, under a statute which provides that "the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause and submit to their con-

[80] Davison v. P. 90 Ill. 221; Wohlford v. P. 148 Ill. 301, 36 N. E. 107; Mullinix v. P. 76 Ill. 211.

[81] McDonald v. S. 63 Ind. 544; Keiser v. S. 83 Ind. 234; Bird v. S. 107 Ind. 154; Walker v. S. 136 Ind. 663.

[82] McCarthy v. S. 56 Ind. 203.

[83] Bird v. S. 107 Ind. 154, 8 N. E. 14; Blaker v. S. 130 Ind. 203, 29 N. E. 1077; Hudelson v. S. 94 Ind. 426; McDonald v. S. 63 Ind. 544.

[84] Keiser v. S. 83 Ind. 234; Fowler v. S. 85 Ind. 538.

[85] Com. v. Anthes, 71 Mass. (5 Gray), 185.

sideration both the law and the facts without any direction how to find their verdict," the jury are the judges of the law, but not in the sense that they are at liberty to disregard it; nor are they at liberty to set aside the law and substitute for it something else which suits their notions. They cannot make law for the occasion.[86]

§ 168. In Maryland and Georgia.—The constitution of Maryland provides that "in the trial of all criminal cases the jury shall be the judges of the law, as well as the fact.[87]" The jury being thus authorized to determine the law, as well as the facts, are not bound by any instructions given them by the court, but are at liberty to disregard them.[88] The court's instructions in such case are regarded as merely advisory.[89]

The Supreme Court of Maryland has declared that in view of the constitutional provision mentioned it is discretionary with the trial court to instruct the jury as to the law, at their request, though the court is not bound to do so.[90] The constitution of Georgia declares that "in all criminal cases the jury shall be the judges of the law and fact."[91] But notwithstanding such constitutional provision the jury should listen to the law given by the court and adopt it if they can conscientiously do so; if not, then they are at liberty to judge the law for themselves.[92] And it is proper for the court to instruct the jury that they cannot set up ideas of their own in opposition to the charge of the court.[93] But the right of the jury to judge of the law is guaranteed to them and the accused by statute, and that right cannot be abridged, weakened or thwarted by the thunder of the court in their ears.[94] An instruction charging the jury that they should be clearly satisfied that the court

[86] S. v. Buckley, 40 Conn. 246; S. v. Thomas, 47 Conn. 546.

[87] Beard v. S. 71 Md. 275, 17 Atl. 1044; Broll v. S. 45 Md. 359.

[88] Broll v. S. 45 Md. 359; Swann v. S. 64 Md. 423, 1 Atl. 872; Wheeler v. S. 42 Md. 563; Franklin v. S. 12 Md. 236; Beard v. S. 71 Md. 275, 17 Atl. 1044, 4 L. R. A. 675.

[89] Swann v. S. 64 Md. 423, 1 Atl. 872; Wheeler v. S. 42 Md. 563; Nuzum v. S. 88 Ind. 594; Beard v. S. 71 Md. 275, 17 Atl. 1044.

[90] Forwood v. S. 49 Md. 537; Wheeler v. S. 42 Md. 569; Guy v. S. 96 Md. 692, 54 Atl. 879; Beard v. S. 71 Md. 280, 17 Atl. 1044, 4 L. R. A. 675; Swann v. S. 64 Md. 425, 1 Atl. 872.

[91] Malone v. S. 66 Ga. 540.

[92] McDaniel v. S. 30 Ga. 853; Danforth v. S. 75 Ga. 614, 623.

[93] Akridge v. Noble, 114 Ga. 949, 41 S. E. 78.

[94] Dickens v. S. 30 Ga. 383; Keener v. S. 18 Ga. 194; McDaniel v. S. 30 Ga. 853.

is wrong before they are authorized to differ from the court is erroneous.[95]

§ 169. In Louisiana and Indiana.—The constitution of Louisiana provides that "the jury in all criminal cases shall be the judges of the law and of the facts on the question of guilt or innocence, having been duly charged as to the law applicable to the case by the presiding judge."[96] Although the jury are the judges of the law, as well as the fact, in criminal cases, as thus provided, they shall heed the law as given them by the court; by which is meant that the charge of the court shall have its moral weight with the jury.[97] Still, the jury should not be tied down by peremptory instructions from the court as to their duty in respect to any particular testimony nor what their course should be as a matter of law in respect to the testimony, in view of the fact that they are the judges of the law and the evidence.[98]

The court is required to instruct the jury as to the law applicable to the case, and they ought to receive it as given to them, though they are under no obligation to do so.[99] But in that state it has been held error to charge the jury that if they "cannot conscientiously believe that the court has given the law correctly they do not violate their oaths in disregarding it," for the reason that they are bound to accept the law as given them by the court.[100] "That the jury are the sole judges of the law and the facts of this case, and that they have the right to ignore the law given them by the court should they deem proper to do so," is also erroneous.[101]

In Indiana the statute requires the court to instruct the jury and to inform them that they have the right to determine the law. But the jury may disregard the instructions of the court and determine the law for themselves. In other words, the instructions of the court are advisory only in their influence upon the ultimate judgment of the jury, both as to the law and

[95] Golden v. S. 25 Ga. 527.

[96] S. v. Ford, 37 La. Ann. 443, 465.

[97] S. v. Desforges, 47 La. Ann. 1167, 17 So. 811; S. v. Tisdale, 41 La. Ann. 338, 6 So. 579.

[98] S. v. Watkins, 106 La. 380, 31 So. 10.

[99] S. v. Tally, 23 La. Ann. 677; S. v. Ballerio, 11 La. Ann. 81; S. v. Scott, 11 La. Ann. 429; S. v. Saliba, 18 La. Ann. 35. But see S. v. Matthews, 38 La. Ann. 795.

[100] S. v. Matthews, 38 La. Ann. 795.

[101] S. v. Powell, 109 La. 727, 33 So. 748.

the facts.[102] While the jury are the judges of the law and the facts, yet this does not give them the right to decide the law, regardless of all law, but it is their duty to follow or determine the law as established by the proper tribunals. Under their oaths they are required to determine the law correctly. But a trial court may not instruct that the law as decided by the Supreme Court is binding upon the jury.[103]

[102] McDonald v. S. 63 Ind. 544; Nuzum v. S. 88 Ind. 599; Wachstetter v. S. 99 Ind. 290.

[103] Keiser v. S. 83 Ind. 234; Anderson v. S. 104 Ind. 467, 4 N. E. 63; Blaker v. S. 130 Ind. 203, 29 N. E. 1077; Walker v. S. 136 Ind. 663, 36 N. E. 356; Smith v. S. 142 Ind. 288, 41 N. E. 595; Reynolds v. S. 147 Ind. 3, 46 N. E. 31; Dean v. S. 147 Ind. 215, 46 N. E. 528; Bridgewater v. S. 153 Ind. 560, 55 N. E. 737.

CHAPTER VI.

JURY DETERMINE THE FACTS.

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§ 170. Court prohibited from expressing opinion.—By constitutional and statutory provisions of many of the states the judges in charging the jury are prohibited from expressing or intimating an opinion on the weight of the evidence, or what the evidence proves or does not prove. Under these provisions the jury are the sole judges of the facts and of the weight of the evidence.[1] And by such provisions in some of the states the

[1] P. v. Welch, 49 Cal. 181; P. v. Casey, 65 Cal. 260, 3 Pac. 874; Beverly v. Burke, 9 Ga. 447; Ross v. S. 29 Tex. 499; Chicago & N. R. Co. v. Moranda, 108 Ill. 582; Cameron v. Vandergriff, 53 Ark.

courts in charging the jury are prohibited not only from expressing opinions on the weight of the evidence, but are also forbidden to sum up or recapitulate the evidence, and are only permitted to declare the law.[2] Hence it is error to instruct the jury in such manner as to impress them with the idea that they are bound by the opinion of the court as to what the evidence proves or does not prove.[3]

381, 13 S. W. 761; S. v. Benner, 64 Me. 267; S. v. Barry, 11 N. Dak. 428, 92 N. W. 809; S. v. Carter, 112 Iowa, 15, 83 N. W. 715; Kearney v. P. (Cal.), 17 Pac. 782; P. v. Webster, 59 Hun (N. Y.) 398, 13 N. Y. S. 414. See, also, Hempton v. S. 111 Wis. 127, 86 N. W. 596; Van Duzor v. Allen, 90 Ill. 499; Myrick v. Wells, 52 Miss. 149; United States Life Ins. Co. v. Lesser, 126 Ala. 568, 28 So. 646; Clark v. Goddard, 39 Ala. 164; S. v. Dorland, 103 Iowa, 168, 72 N. W. 492; Ryder v. S. 100 Ga. 528, 28 S. E. 246; Tyler v. Chesapeake & O. R. Co. 88 Va. 389, 13 S. E. 975; Florida C. & P. R. Co. v. Lucas, 110 Ga. 121, 35 S. E. 283; S. v. Hahn, 38 La. Ann. 169; Ohio & M. R. Co. v. Pearcy, 128 Ind. 197, 27 N. E. 479; P. v. O'Brien, 130 Cal. 1, 62 Pac. 297; Earp v. Edginton, 107 Tenn. 23, 64 S. W. 40; Riviere v. McCormick, 14 La. Ann. 139; Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Fulwider v. Ingels, 87 Ind. 414; S. v. Mahoney, 24 Mont. 281, 61 Pac. 647; Kearney v. S. 68 Miss. 233, 8 So. 492; S. v. Reed, 62 Me. 129; Lorie v. Adams, 51 Kas. 692, 33 Pac. 599; Granby Mining & S. Co. v. Davis, 156 Mo. 422, 57 S. W. 126; S. v. Daly, 16 Ore. 240, 18 Pac. 357; S. v. Greer, 22 W. Va. 801; Kirk v. Ter. 10 Okl. 46, 60 Pac. 797; Williams v. Dickenson, 28 Fla. 90, 9 So. 847; Com. v. Briant, 142 Mass. 463, 8 N. E. 338; Texas, &c. R. Co. v. Durrett, 26 Tex. Cv. App. 268, 63 S. W. 904; S. v. Tickel, 13 Nev. 502; Meadows v. Truesdale (Tex. Cv. App.), 56 S. W. 932; Carroll v. Chicago, St. P. M. & O. R. Co. (Iowa), 84 N. W. 1035; Hughes Cr. Law, § 3246, citing: Andrews v. P. 60 Ill. 354; S. v. Pepo, 23 Mont. 473. 59 Pac. 721; Logg v. S. 92 Ill. 598; S. v. Kerns, 47 W. Va. 266, 34 S. E. 734; Delvin v. P. 104 Ill. 504; S. v. Mitchell, 56 S. Car. 524, 35 S. E. 210; P. v. Travers, 88 Cal. 233, 26 Pac. 88; S. v. Rose, 47 Minn. 47, 49 N. W. 404; Stephens v. S. 10 Tex. App. 120; Barnett v. Com. 84 Ky. 449, 1 S. W. 722; Starr v. United States, 153 U. S. 614, 14 Sup. Ct. 919; Chapman v. S. 109 Ga. 157, 34 S. E. 369; P. v. Plyler, 126 Cal. 379, 58 Pac. 904; Williams v. S. 46 Neb. 704, 65 N. W. 783; Merritt v. S. 107 Ga. 675, 34 S. E. 361; S. v. Austin, 109 Iowa, 118, 80 N. W. 303; P. v. Ferraro, 161 N. Y. 365, 55 N. E. 931, 15 N. Y. Cr. 266; S. v. Schmepel, 23 Mont. 523, 59 Pac. 927; Fuller v. New York L. Ins. Co. (Mass.), 67 N. E. 879; Ward v. Brown, 53 W. Va. 237; Central Tobacco Co. v. Knoop, 24 Ky. L. R. 1268, 71 S. W. 3; Potter v. S. 117 Ala. 693; Galveston, &c. R. Co. v. Karver (Tex. Cv. App.), 70 S. W. 328.

[2] Southern R. Co. v. Kendrick, 40 Miss. 374; Renand v. City of Bay City, 124 Mich. 29, 82 N. W. 1008; S. v. Asberry, 37 La. Ann. 125 (as to criminal cases); S. v. Green, 7 La. Ann. 518; Hannah v. S. 1 Tex. App. 579 (as to criminal cases). In North Carolina the court in charging the jury is required by statute to state "in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon," S. v. Norris, 10 N. Car. 391; S. v. Brady, 107 N. Car. 822, 12 S. E. 325.

[3] Shanck v. Morris, 2 Sweeney (N. Y.), 464; Heydrick v. Hutchinson, 165 Pa. St. 208; 30 Atl. 819; Burke v. Maxwell, 81 Pa. St. 139; Burdick v. P. 58 Barb. (N. Y.), 51.

§ 171. By common law court may express opinion.—But in the absence of such constitutional or statutory provisions under the common law the court in charging the jury may comment upon the facts and express an opinion on the weight of the evidence as to what it proves or tends to prove or does not prove, provided the jury are ultimately left free to determine the facts.[4]

§ 172. Submitting facts hypothetically.—But the provisions above mentioned do not prohibit the court from enumerating the facts hypothetically which the evidence tends to prove without intimating an opinion as to the truth or falsity of the facts, and charging that if the jury believe the facts thus enumerated they should find for the plaintiff, or find the defendant guilty, as the case may be.[5] Thus, for example, it is not a violation

[4] Vanarsdale v. Hax, 107 Fed. 878; Steven v. Talcott, 11 Vt. 25; Pool v. White, 175 Pa. St. 459. 34 Atl. 801; Setchel v. Keigeoin, 57 Conn. 478, 18 Atl. 594; Smith v. S. 41 N. J. L. 374; Hurlburt v. Hurlburt, 128 N. Y. 420, 28 N. E. 651; Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853; Simmons v. United States, 142 U. S. 148; First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Holder v. S. 5 Ga. 444; Goldsworthy v. Town of Linden, 75 Wis. 24, 43 N. W. 656; Durkee v. Marshall, 7 Wend. (N. Y.), 312; S. v. Lynott, 5 R. I. 295; Shoohn v. Com. 106 Pa. St. 369; New York Fire Ins. Co. v. Walden, 12 Johns, (N. Y.), 519. See, also, Ames v. Cannon River Mfg. Co. 27 Minn. 245, 6 N. W. 787; Follmer v. McGinley, 146 Pa. St. 517, 23 Atl. 393; Anderson v. Avis, 62 Fed. 227; Bonner v. Herrick, 99 Pa. St. 225; Sindram v. P. 88 N. Y. 203; Haines v. McLaughlin, 135 U. S. 584; Ketchum v. Ebert, 33 Wis. 611; Knapp v. Griffin, 140 Pa. St. 604, 21 Atl. 449. Under such constitutional provision of South Carolina it is error for the court to comment on the facts in charging the jury, although the evidence is not disputed or contradicted, S. v. Cannon, 49 S. Car. 550, 27 S. E. 526. See, generally, cases prohibiting comment on the evidence by the court: Winter v. Supreme Lodge K. P. 96 Mo. App. 67, 68 S. W. 662; City of Bonham v. Crider (Tex. Cv. App.), 27 S. W. 419 (refused); Hartshorne v. Byrne, 147 Ill. 418, 35 N. E. 622; Rawls v. S. 97 Ga. 186, 22 S. E. 529; Ware v. S. 96 Ga. 349, 23 S. E. 410; Com. v. Flynn, 165 Mass. 153, 42 N. E. 562; P. v. Brow, 35 N. Y. S. 1009, 90 Hun, 509; Yarborough v. S. 86 Ga. 396, 12 S. E. 650.

[5] P. v. Hitchcock, 104 Cal. 482, 38 Pac. 198; S. v. Mitchell, 41 La. Ann. 1073, 6 So. 785; Davis v. Elmore, 40 S. Car. 533, 19 S. E. 204; Shea v. City of Muncie, 148 Ind. 14, 46 N. E. 138; Norris v. Clinkscales, 47 S. Car. 488, 25 S. E. 797. Facts must be stated hypothetically. Gable v. Rauch, 50 S. Car. 95, 27 S. E. 555. Rattlemiller v. Stone, 28 Wash. 104, 68 Pac. 168; S. v. Means, 95 Me. 364, 50 Atl. 30; Ryan v. Los Angeles I. & C. S. Co. 112 Cal. 244, 44 Pac. 471; Lagrone v. Timmerman, 46 S. Car. 372, 24 S. E. 290; S. v. Whittle, 59 S. Car. 297, 37 S. E. 923; Thompson v. Johnson (Tex. Cv. App.), 58 S. W. 1030; Hamlin v. Treat, 87 Me. 310, 32 Atl. 909. See, also, Hannibal & St. J. R. Co. v. Mar-

of the constitutional provision which confines the court to a statement of the law, to charge that if the jury believe from the evidence beyond a reasonable doubt that the defendant testified to a certain state of facts (enumerating them) knowingly and wilfully he is guilty.[6] But where the facts are in dispute, or the evidence is conflicting, the instructions should be hypothetical in form, that is, they should state the law upon a supposed state of facts to be determined by the jury.[7] But where the evidence clearly and conclusively shows without dispute that a material averment or fact is true it is error to submit the same to the jury hypothetically as though it were in dispute.[8]

A fact which is admitted or undisputed by the parties should not be submitted for the jury to determine.[9] For to call upon the jury to decide whether an undisputed fact is or is not proved is to mislead them to the supposition that they may find either way when the evidence warrants but one conclusion.[10]

§ 173. Instructing that "evidence tends to show."—It is not error for the court in reciting the substance of the testimony to say "the evidence tends to show" a certain fact. The use of such expression does not imply an opinion of the court on

tin, 111 Ill. 219; Ladd v. Pigott, 114 Ill. 647, 2 N. E. 503; Morgan v. Wattles, 69 Ind. 260; O'Connell v. St. Louis C. & W. R. Co. 106 Mo. 482, 17 S. W. 494.

[6] P. v. Hitchcock, 104 Cal. 482, 38 Pac. 198; S. v. Fetterer, 65 Conn. 287, 32 Atl. 394. But see P. v. Landman, 103 Cal. 577, 37 Pac. 518; P. v. Hertz, 105 Cal. 660, 39 Pac. 32.

[7] Sherman v. Dutch, 16 Ill. 282; Wall v. Goodenough, 16 Ill. 415; Gowen v. Kehoe, 71 Ill. 66; Eames v. Blackhart, 12 Ill. 195; Chambers v. P. 105 Ill. 409; Bond v. P. 39 Ill. 26; Bartling v. Behrends, 20 Neb. 211, 29 N. W. 472; Wilson v. Williams, 52 Miss. 487; Linville v. Welch, 29 Mo. 203; P. v. Levison, 16 Cal. 98; Stillwell v. Gray, 17 Ark. 473; Dodge v. Brown, 22 Mich. 446; Bartley v. Williams, 66 Pa. St. 329; Hopkinson v. P. 18 Ill. 264. See Belt v. P. 97 Ill. 473 (an instruction stating a legal proposition hypothetically need not make reference to the evidence, by the use of the words "from the evidence in the case").

[8] Galveston H. & S. A. R. Co. v. Dyer (Tex. Cv. App.), 38 S. W. 218; Houston & T. C. R. Co. v. Harion (Tex. Cv. App.), 54 S. W. 629; Galveston, H. & S. A. R. Co. v. Thompson (Tex. Cv. App.), 44 S. W. 8; Scroggins v. S. 120 Ala. 369, 25 So. 180. See Johnson v. International & G. Co. 24 Tex. Cv. App. 148, 57 S. W. 869; Winters v. Mowrer, 163 Pa. St. 239, 29 Atl. 916; Texas & P. R. Co. v. Moore, 8 Tex. Cv. App. 289, 27 S. W. 962.

[9] Winkler v. Winkler (Tex. Cv. App.), 26 S. W. 893.

[10] Hawk v. Brownell, 120 Ill. 161, 165, 11 N. E. 416. See Schmidt v. Pfau, 114 Ill. 494, 503, 2 N. E. 522.

the weight of the evidence.[11] Or to charge that "there is some evidence tending to show" a certain fact is not error as a comment on the weight of the evidence.[12] Nor is it improper to instruct the jury that a party claims that a certain fact is shown by the evidence.[13] The respective claims of the parties may be stated, when fairly done, for the purpose of making a proper application of the law to facts in evidence.[14]

§ 174. Competency of evidence—Is there any evidence?—But the court must determine whether there is any evidence for the consideration of the jury, tending to prove an issue or fact involved; and, of course, if there is no evidence the court may, as a matter of law, instruct to that effect without invading the province of the jury.[15] And whether evidence is competent or not must be determined by the court.[16] Where there is no evidence tending to prove a fact the court may instruct the jury to disregard such fact.[17] On the other hand, if there is any evidence tending to prove a material fact in issue an instruction stating that there is no evidence of such fact is improper, as invading the province of the jury.[18] The court cannot, as a matter of law, instruct the jury what constitutes prima facie evidence of a fact unless the law so provides.[19]

[11] Lewis v. Norfolk & W. R. Co. 132 N. Car. 382, 43 S. E. 919; Graham v. Nowlin, 54 Ind. 389; S. v. Watkins, 11 Nev. 30; P. v. Flannelly, 128 Cal. 83, 60 Pac. 670. Contra: S. v. Donovan, 61 Iowa, 369, 16 N. E. 206; Missouri Pac. R. Co. v. Christman, 65 Tex. 369.

[12] Michie v. Cochran, 93 Va. 614, 25 So. 884; S. v. Brown, 28 Ore. 147, 41 Pac. 1042. See S. v. Edwards, 126 N. Car. 1051, 35 S. E. 540; P. v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

[13] Hawley v. Chicago B. & Q. R. Co. 71 Iowa, 717, 29 N. W. 787.

[14] Mimms v. S. 16 Ohio St. 234.

[15] Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91; Kent v. S. 64 Ark. 247, 41 S. W. 849; King v. King, 155 Mo. 406, 56 S. W. 534; S. v. Gibbons, 10 Iowa, 117; Pepperall v. City P. Tr. Co. 15 Wash. 176, 45 Pac. 743; Bryce v. Cayce, 62 S. Car. 546, 40 S. E. 948; Underwood v. American Mortg. Co. 97 Ga. 238, 24 S. E. 847; P. v. Welch, 49 Cal. 174; P. v. Sternberg, 111 Cal. 3, 43 Pac. 198 (accomplice); Wells v. Clements, 48 N. Car. 168; Willis v. Branch, 94 N. Car. 142; S. v. Banks, 48 Ind. 197; Lange v. Weigan, 125 Mich. 647, 85 N. W. 109.

[16] International Farmer's Live Stock Ins. Co. v. Byrkett (Ind. App.), 36 N. E. 779.

[17] Lange v. Weigan, 125 Mich. 647, 85 N. W. 109.

[18] Hunter v. Third Ave. R. Co. 45 N. Y. S. 1044, 20 Misc. 432; Jones v. Cleveland, 6 Pa. Super. Ct. 640; S. v. Horton L. & L. Co. 161 Mo. 664; Cederson v. Oregon R. & N. Co. 38 Ore. 343, 62 Pac. 637, 63 Pac. 763.

[19] Missouri Pac. R. Co. v. Byars, 58 Ark. 108, 23 S. W. 583. See Wheeler v. Schroeder, 4 R. I. 383.

§ 175. Intimating opinion is improper.—The giving of instructions which intimate what the judge of the court believes the evidence establishes as to any of the material facts in issue is improper, it being the province of the jury, and not the court, to determine the facts.[20] The expression of an opinion by the court as to what has been proved by the evidence is not only improper, but erroneous.[21] Especially is it improper for the court, by instructions, to express any opinion upon any combination of facts which does not embrace every contrary hypothesis which the evidence tends to establish.[22] And although the court's opinion on the weight of the evidence may be correct as expressed, that will not cure the mischief.[23]

§ 176. Opinion not intimated—Illustrations.—An instruction that if the plaintiff by his negligence contributed to his injury, so that but for it he would not have been hurt, the jury should find for the defendant, is not objectionable as invading the province of the jury.[24] A charge that "if the agent of the defendant knew at the time of the delivery of the certificate or policy of insurance whether the party was sick or not, and knew he was sick and delivered the policy, then it would be a waiver; that a waiver implies the idea that one has a right, and, with knowledge of his rights and that which might defeat his rights, does an act by which he waives the right to stand upon his legal position or his legal right," is not a charge on the testimony.[25]

A charge in substance stating that direct evidence is not essential to prove fraud, but that it may be inferred from all the

[20] S. v. Allen, 45 W. Va. 65, 30 S. E. 209; Coon v. P. 99 Ill. 368; Martin v. S. (Tex. Cr. App.), 43 S. W. 91; Yundt v. Hartrunft, 41 Ill. 14; Highway Comrs. v. Highway Comr. 60 Ill. 58; Andrews v. P. 60 Ill. 354, 357; Cutter v. Callison, 72 Ill. 113, 117; Citizens' St. R. Co. v. Burke, 98 Tenn. 650, 40 S. W. 1085; Williams v. S. 46 Neb. 704, 65 N. W. 783; Hine v. Commercial Bank, 119 Mich. 448, 78 N. W. 471; Threadgill v. Commissioners, 116 N. Car. 616, 21 S. E. 425; Davis v. Dregne, (Wis.), 97 N. W. 512.

[21] S. v. Hopkins, 50 La. Ann. 1171, 24 So. 188; Dorsey v. S. 110 Ga. 331, 35 S. E. 651; Searles v. S. 97 Ga. 692, 25 S. E. 388; Ezell v. S. 103 Ala. 8, 15 So. 818; Florida C. & P. R. Co. v. Lucas, 110 Ga. 121, 35 S. E. 283.

[22] Weyrich v. P. 89 Ill. 99.

[23] Acme Brewing Co. v. Central R. & B. Co. 115 Ga. 494, 42 S. E. 8; S. v. Hyde, 20 Wash. 234, 55 Pac. 49.

[24] Campbell v. McCoy, 3 Tex. Cv. App. 298, 23 S. W. 34.

[25] Hollings v. Banker's Union of the World, 63 S. Car. 192, 41 S. E. 90.

facts and circumstances of the case; and that if the jury believe certain facts (enumerating them) they will find that there was a fraudulent conveyance, is not objectionable as telling the jury that fraud has been established.[26] A charge stating that "if the truth comes from the lips of a negro you are bound to believe it just as much as if it comes from the lips of a white man" is not a charge on the evidence.[27] Telling the jury that they may "consider what influence, if any, the passing of the engine would have upon the mind and conduct of a prudent person placed as the plaintiff was," was held not an improper comment on the evidence.[28]

In determining whether the employés in charge of an engine at the time it was approaching a public crossing were exercising ordinary care, or were guilty of negligence, an instruction stating that the jury might consider the rate of speed of the engine, the signals, if any were given, the place of the accident, and all the facts and circumstances as to the movement and management of the train, is not erroneous, but rather a proper guide to aid the jury in determining what would, under the circumstances, constitute negligence.[29] In an action for assault and battery, for the court to instruct that the plaintiff's injuries are either very severe and serious, or very slight and that the plaintiff is shamming, has been held not to be error where the evidence showed that the plaintiff had either become a mental wreck from the alleged assault, or that he was in fact shamming and practicing a fraud.[30]

The court by instructing the jury that the case is "one mostly of positive testimony" does not by such statement express an opinion on the weight of the evidence, where, in fact, the evidence is mostly positive.[31] A remark by the court that "I will allow any testimony that will tend to elucidate the facts in this case," cannot be held objectionable as intimating an opinion of the court on the weight or value of the testimony.[32]

[26] Alberger v. White, 117 Mo. 347, 23 S. W. 92.

[27] McDaniels v. Monroe, 63 S. Car. 307, 41 S. E. 456.

[28] Baker v. Kansas City, &c. R. Co. 147 Mo. 140, 48 S. W. 838.

[29] Lloyd v. St. Louis, I. M. & S. R. Co. 128 Mo. 595, 31 S. W. 110.

[30] Spear v. Sweeney, 88 Wis. 545, 60 N. W. 1060.

[31] S. v. Burns, 19 Wash. 52, 52 Pac. 316.

[32] Hoxie v. S. 114 Ga. 19, 39 S. E. 944.

§ 177. Opinion intimated—Illustrations.—For the court to charge the jury that the contract in question is conceded, when in fact it was denied, is error, although the jury may have been recalled by the court and informed that the court was in error, that counsel says that the court instructed wrong.[33] An instruction charging the jury to give more weight to one kind of evidence than to another kind is improper, especially where the evidence is conflicting.[34] A charge that if the jury believe the evidence for the defendant they must find for the defendant is erroneous when there is other testimony in the case.[35] It is an improper comment on the evidence for the court to charge that "fraud will never be presumed from mere obscurity, or apparent error or incorrectness of the plaintiff's valuation of his property" in a suit to recover on an insurance policy for loss by fire.[36] Also, in an action against a railroad company for the destruction of grass by fire, charging the jury that they may consider the fact of burning by other fires and the volume and quantity of sparks emitted from the engine, is improper as invading the province of the jury in weighing the evidence.[37]

For the court to charge the jury that if the defendants were insolvent and unable to pay for goods at the time they purchased them an intent not to pay for them should be presumed is improper as charging on the weight of the evidence.[38] A charge that "if the bridge was defective and unsafe on account of decay of the timbers, and considering the length of time the bridge has been built, this condition ought to have been anticipated and known by the officers of the town, using ordinary care and precaution," is an invasion of the duty of the jury.[39] Also a charge stating that "there is evidence showing plaintiff did not stop the cattle before going upon the crossing" is

[33] Hawley v. Corey, 9 Utah, 175, 33 Pac. 695.

[34] Williams v. La Penatiere, 32 Fla. 491, 14 So. 157; Wheeler v. Baars, 33 Fla. 696, 15 So. 584; Bowie v. Maddox, 29 Ga. 285.

[35] Louisville & N. R. Co. v. Rice, 101 Ala. 676, 14 So. 639.

[36] F. Dohmen Co. v. Niagara Fire Ins. Co. 96 Wis. 38, 71 N. W. 69.

[37] Galveston, H. & S. A. R. Co. v. Knippa (Tex. Cv. App.), 27 S. W. 730; Blashfield Instructions, § 47, p. 111.

[38] Barton v. Strond-Gibson Grocery Co. (Tex. Cv. App.), 40 S. W. 1050.

[39] Bredlau v. Town of York, 115 Wis. 554, 92 N. W. 261.

erroneous, as it is the exclusive province of the jury to find what is shown by the evidence.[40]

§ 178. Opinion not intimated—Criminal cases.—The expression of an opinion by the court that there is no evidence tending to reduce the charge of murder to manslaughter affords no ground for complaint where the jury are further instructed that the facts were to be determined by them from the evidence, and not by the court.[41] A charge that if the jury believe from the evidence that the defendant wilfully struck another with a pistol which was a deadly weapon, or calculated to produce death, when used in the way and manner the same was used, is not improper as taking from the jury the duty of determining whether the pistol was a deadly weapon, considering the manner in which it was used by the defendant.[42] An instruction stating in substance that if the jury believe from the evidence that the defendant took hold of the prosecutrix and tore open her coat, and seized her arm with intent to have carnal knowledge of her against her will and with the intent to accomplish his object at all events, without regard to any resistance she might make, he is guilty of assault with intent to commit rape, is not an invasion of the province of the jury.[43]

A charge that "innocent men, men conscious of innocency, do not have much occasion to fear a grand jury, and it is rather unusual, I think you will say in your own experience, that men who are conscious of having committed no offense either to fear an indictment or to undertake to get out of the jurisdiction when a grand jury is sitting," was held not to be the expression of an opinion by the court in violation of a statute prohibiting the court from expressing an opinion during the trial.[44] An instruction charging that the jury may disregard any testimony which they believe from the evidence to be false, is proper where the evidence is conflicting.[45] And where the testimony of the witnesses for the defense is controverted by

[40] Kinyon v. Chicago & N. W. R. Co. 118 Iowa, 349, 92 N. W. 40.

[41] Com. v. McGowan, 189 Pa. St. 641, 42 Atl. 365.

[42] Smallwood v. Com. 19 Ky. L. R. 344, 40 S. W. 248.

[43] S. v. Urie, 101 Iowa, 411, 70 N. W. 603.

[44] S. v. Means, 95 Me. 364, 50 Atl. 30. See Adams v. S. 133 Ala. 166, 31 So. 851.

[45] S. v. Goforth, 136 Mo. 111, 37 S. W. 801; Allen v. U. S. 164 U. S. 492, 17 Sup. Ct. 154.

the prosecution it is not improper to instruct that if the jury believe the defendant has knowingly introduced false testimony this fact may be considered as tending to show his guilt.[46]

Charging the jury that if they believe the evidence introduced by the state to be true it is their duty to convict the defendant, if such evidence establishes his guilt beyond a reasonable doubt, is not improper where the jury are also instructed as to what is meant by a reasonable doubt.[47] Or that if the jury believe the testimony of the defendant as given by him in his own behalf they may convict him where the evidence otherwise justifies the giving of such an instruction.[48]

§ 179. Opinion intimated—Criminal cases.—A charge that "the flight of a person suspected of a crime is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and is entitled to more or less weight, according to the circumstances of the particular case in which such evidence is received, not as a part of the doing of the criminal act itself, but as indicative of a guilty mind; that at most it is but a circumstance tending to establish a consciousness of guilt in the person fleeing," is erroneous as on the weight of the evidence.[49] So to instruct that if the testimony of a witness is true then the defendant is guilty, is improper as being an invasion of the province of the jury where it appears from the evidence that such witness did not see the crime committed by the defendant.[50]

Charging the jury that "the evidence as to stolen property—as to recovering possession of any property—was introduced by the state to show that the defendant had possession of stolen property, and is only for the purpose of fixing the crime on him," is improper as intimating an opinion of the court.[51]

In a homicide case an instruction which states that if the defendant inflicted the blow designedly he will be presumed to

[46] Allen v. U. S. 164 U. S. 492, 17 Sup. Ct. 154; S. v. Magoon, 68 Vt. 289, 35 Atl. 310. Contra: Ter. v. Lucero (N. Mex.), 46 Pac. 18.

[47] Derby v. S. 60 N. J. L. 258, 37 Atl. 614. See S. v. Green, 48 S. Car. 136, 26 S. E. 234.

[48] S. v. Woolard, 119 N. Car. 779, 25 S. E. 719.

[49] Cleavenger v. S. 43 Tex. Cr. App. 273, 65 S. W. 89.

[50] S. v. Green, 48 S. Car. 136, 26 S. E. 234.

[51] Seals v. S. 97 Ga. 692, 25 S. E. 388.

have intended the probable consequences of his act is erroneous in that it invades the province of the jury.[52] Also, telling the jury that certain facts (enumerating them) or circumstances do not prove the guilt of the defendant is improper as an invasion of the province of the jury when such facts and circumstances, together with other evidence, tend to prove the defendant's guilt.[53]

§ 180. Instructions as to dying declarations.—The admissibility of a dying declaration is a question exclusively for the court to determine, but its credibility is for the jury, and the court should so instruct the jury;[54] hence the court cannot instruct as to the weight of such statements.[55] Dying declarations should be weighed by the ordinary rules governing the admission of other evidence; hence an instruction that "this kind of evidence is not so satisfactory as the evidence of the witnesses upon the witness-stand, and should, therefore, be carefully scrutinized" is improper as discrediting and casting suspicion upon such evidence.[56]

An instruction that dying declarations are not entitled to the same weight as would be the testimony of the deceased were he present in court and testifying as a witness is properly refused as being an improper comment upon the weight of the evidence.[57] Also, a charge that dying declarations should be received with great caution is likewise improper.[58] Where the deceased, in his dying statement, positively declared that the defendant shot him; that he knew it, because he was very near to him at the time, an instruction submitting to the jury whether such statement was merely an opinion, and if so, it should not be considered as evidence, is erroneous.[59]

§ 181. Inferences and conclusions are for the jury.—It is not within the province of the court by instruction to tell the jury

[52] P. v. Martin, 53 N. Y. S. 745, 33 App. Div. 282.
[53] Wilson v. S. 71 Miss. 880, 16 So. 304.
[54] S. v. Phillips, 118 Iowa, 660, 92 N. W. 876.
[55] P. v. Amaya, 134 Cal. 531, 66 Pac. 794.
[56] Shenkenberger v. S. 154 Ind. 630, 639, 57 N. E. 519.
[57] S. v. Reed, 137 Mo. 125, 38 S. W. 574.
[58] S. v. Gay, 18 Mont. 51, 44 Pac. 411.
[59] Allen v. S. 70 Ark. 22, 68 S. W. 28.

that an ultimate fact is established from the proof of certain evidentiary facts; that is, that if certain facts (enumerating them) are established then the ultimate fact is proved. To so instruct would be invading the province of the jury.[60] What inferences may be drawn from the evidence should be left entirely to the jury without any intimation by the court in that respect.[61] In Massachusetts it has been held not to be error for the court, in commenting on the evidence, to state that it has a tendency to prove or is prima facie proof of a fact; that such charge is not a direction to the jury to find such fact, but merely that an inference of such fact would be supported by the evidence.[62] But where a presumption of law arises from the existence of certain facts then the court is authorized to instruct the jury as to the inference to be drawn in the event the evidence establishes the necessary facts to constitute the basis of such presumption.[63] But it is not proper for the court by instruction to say that the evidence admits of only one particular construction. It is for the jury to draw their own conclusions from the evidence—what it proves or does not prove.[64]

§ 182. Weight of evidence is for the jury to determine.—The weight of the evidence must be determined by the jury; hence it is improper for the court to instruct that certain facts are entitled to little weight.[65] Whether circumstances shown in evidence are entitled to any weight or not is purely a matter for

[60] Chicago, B. & Q. R. Co. v. Warner, 123 Ill. 49, 14 N. E. 206; Mayer v. Wilkins, 37 Fla. 244, 19 So. 639 (fraud).

[61] Omaha Fair & E. Asso. v. Missouri Pac. R. Co. 42 Neb. 105, 60 N. W. 330; City of Columbus v. Strassner, 138 Ind. 301, 37 N. E. 719; Howard v. Carpenter, 22 Md. 10; Bluedorn v. Missouri Pac. R. Co. (Mo.), 24 S. W. 57; Clifford v. Lee (Tex. Cv. App.), 23 S. W. 843; Louisville, N. A. & C. R. Co. v Falvey, 104 Ind. 409; Brownell v. Fuller, 60 Neb. 558, 83 N. W. 669; Cain v. Hunt, 41 Ind. 466; Union M. L. Ins. Co. v. Buchanan, 100 Ind. 81; Shultz v. Shultz, 113 Mich. 502, 71 N. W. 854; S. v. Mahoney, 24 Mont. 281, 61 Pac. 647.

[62] Cormody v. Boston Gaslight Co. 162 Mass. 539, 39 N. E. 184.

[63] Wheeler v. Schroeder, 4 R. I. 383.

[64] Langdon v. P. 133 Ill. 408, 24 N. E. 874; Chicago & E. I. R. Co. v. O'Conner, 119 Ill. 598, 9 N. E. 263; McQuay v. Richmond & D. R. Co. 109 N. Car. 585, 13 S. E. 944; Burkham v. Mastin, 54 Ala. 122.

[65] Smith v. Meyers, 52 Neb. 70, 71 N. W. 1006; Bonner v. S. 107 Ala. 97, 18 So. 226; Granby M. & S. Co. v. Davis, 156 Mo. 422, 57 S. W. 126; Knowles v. Nixon, 17 Mont. 473, 43 Pac. 628; Davis v. Hays, 89 Ala. 563, 8 So. 131 (full weight).

the jury to determine; hence it is improper for the court to say that the jury must give weight to certain circumstances.[66] The weight of the evidence is a matter exclusively for the jury, and it is not within the province of the court by instructions to intimate anything on the subject.[67] In testing the truth and weight of evidence, and what it proves, the jury must do so by their knowledge and judgment derived from experience, observation and reflection. They are not bound to regard evidence precisely as given, but must consider its truth and weight by their knowledge of men and the business affairs of life, together with the motives which influence men.[68]

§ 183. Negligence—When a question of fact, when of law. Where the question of negligence is an element of the case it is for the jury to determine from all the evidence whether the party charged with negligence is guilty or not. The court cannot say by instructions that a certain fact or state of facts, constitute negligence.[69] For to say to the jury as a matter of law that certain facts per se constitute negligence is improper.

[66] Moody v. S. 114 Ga. 449, 40 S. E. 242. See Dickenson v. S. (Tex. Cr. App.), 63 S. W. 328; Phillips v. Williams, 39 Ga. 602; Marr v. Marr, 5 Sneed (Tenn.), 385.

[67] Richmond v. Roberts, 98 Ill. 472, 479; Village of Fairbury v. Rogers, 98 Ill. 554; Johnson v. S. (Miss.), 27 So. 880; Stobie v. Dills, 62 Ill. 432, 438; Rice & Bullen Matting Co. v. International Bank, 185 Ill. 422, 56 N. E. 1062; City of Dallas v. Breeman, 23 Tex. Cv. App. 315, 55 S. W. 762; Granby Mining & Smelting Co. v. Davis, 156 Mo. 422, 57 S. W. 126; Hull v. City of St. Louis, 138 Mo. 618, 39 S. W. 446; Citizens' St. R. Co. v. Burke, 98 Tenn. 650; Bunting v. Saltz, 84 Cal. 168, 24 Pac. 167; S. v. Wyse, 32 S. Car 45, 40 S. W. 1085; Hartshorn v. Byrne, 147 Ill. 418, 35 N. E. 622; Kinney v. North Carolina R. Co. 122 N. Car. 961, 30 S. E. 318; Short v. Kelly (Tex. Civ. App.), 62 S. W. 944; Canado v. Curry, 73 Ind. 246 (stating that testimony is evenly balanced); S. v. Swayne, 30 La. Ann. 1323; Bardwell v. Ziegler, 3 Wash. 34, 28 Pac. 360; McVeigh v. S. 43 Tex. Cv. App. 17, 62 S. W. 757; Leonard v. Ter. 2 Wash. Ter. 381 (disproving circumstances), 7 Pac. 872; Burkham v. Martin, 54 Ala. 122 (stating that the evidence is conclusive); Jenkins v. Tobin, 31 Ark. 307; Wolcott v. Heath, 78 Ill. 433.

[68] Ottawa Gas Light & Coke Co. v. Graham, 28 Ill. 73, 78; Chicago, B. & Q. R. Co. v. Krayenbuhl (Neb.), 91 N. W. 880. See Sanford v. Gates, 38 Kas. 405, 16 Pac. 807.

[69] Pennsylvania Co. v. McCaffrey, 173 Ill. 175, 50 N. E. 713; Chicago & Alton R. Co. v. Maroney, 170 Ill. 526, 48 N. E. 953; City of Peoria v. Gerber, 168 Ill. 323, 48 N. E. 152; North Chicago St. R. Co. v. Williams, 140 Ill. 281, 29 N. E. 672; Illinois Cent. R. Co. v. Slater, 139 Ill. 199, 28 N. E. 830; Lake S. & M. S. R. Co. v. O'Conner, 115 Ill. 254, 262, 3 N. E. 501; Taylor v. Felsing, 164 Ill. 331, 338, 45 N. E. 161; New York C. & St. L. R. Co. v. Blumenthal, 160 Ill. 40, 49, 43 N. E. 809; Illinois Cent. R. Co. v. O'Keefe, 154 Ill. 508, 514, 39 N. E.

Negligence is a question of fact to be proved like any other fact in issue. But, of course, this does not mean that the definition of negligence is a question of fact.[70]

Courts are not at liberty to say, as a matter of law, by instructions that a person must conduct himself in a particular manner and observe a certain line of conduct under all circumstances. Negligence does not become a question of law alone, unless the acts constituting it are of such a character that all reasonable men would concur in pronouncing it so.[71] Nor can the court tell the jury what does not constitute negligence, as by instructing "that the mere fact that a drawbar of a car should break when struck by another car in motion is not sufficent to establish negligence." It is for the jury to determine whether the facts proved do or do not constitute negligence.[72] Nor has the court the right to charge, where negligence is an element, that if all the evidence be believed the plaintiff cannot recover, where the evidence shows that the plaintiff has made out a prima facie case. The weight of the evidence is for the jury to determine.[73]

On the same principle it is improper for the court to state to the jury that if a person gets upon a street car drawn by horses, while it is in motion, his act is such conclusive proof of contributory negligence that he cannot recover for an injury

606; Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 135, 38 N. E. 578; East St. L. C. R. Co. v. O'Harra, 150 Ill. 580, 586, 37 N. E. 917; Chicago & A. R. Co. v. Kelly, 182 Ill. 167, 173, 54 N. E. 979; Consolidated Coal Co. v. Bokamp, 181 Ill. 9, 18, 54 N. E. 567; Gohn v. Doerle, 85 Ill. 514; Texas, &c. R. Co. v. Nelson, 9 Tex. Cv. App. 156, 29 S. W. 78; Chicago & A. R. Co. v. Anderson, 162 Ill. 572, 46 N. E. 1125; San Antonio & A. P. R. Co. v. Long, 4 Tex. Cv. App. 497, 23 S. W. 499; Chesapeake & O. R. Co. v. Gunter, 108 Ky. 365, 56 S. W. 527; Texas C. R. Co. v. Burnett, 80 Tex. 536, 16 S. W. 320.

[70] Pennsylvania Co. v. Conlan, 101 Ill. 106; North C. St. R. Co. v. Williams, 140 Ill. 281, 29 N. E. 672; Houston & T. C. R. Co. v. Hubbard (Tex. Cv. App.), 37 S. W. 25. The court cannot say by instruction what facts do or do not constitute fraud, Leasure v. Colburn, 57 Ind. 274. See Higginbotham v. Campbell, 85 Ga. 638, 11 S. E. 1027; Shealy v. Edwards, 75 Ala. 411; nor what facts constitute undue influence in a will contest, Higginbotham v. Higginbotham, 106 Ala. 314, 17 So. 516; In re Townsend's Estate (Iowa), 97 N. W. 1111.

[71] Chicago B. & Q. R. Co. v. Pollock, 195 Ill. 162, 62 N. E. 831.

[72] Ohio & M. R. Co. v. Wangslin, 152 Ill. 141, 38 N. E. 760; North C. St. R. Co. v. Eldridge, 151 Ill. 550, 38 N. E. 246; Galveston, H. & S. A. R. Co. v. Michalke, 14 Tex. Cv. App. 495, 37 S. W. 480.

[73] Sherrill v. Western N. T. Co. 116 N. Car. 655, 21 S. E. 429.

sustained while thus getting on the car. It is not negligence per se for a person to get on or off a street car under the circumstance stated.[74] Nor can the court instruct that the omission or commission of a certain act would be a want of care or due caution.[75] But where negligence is made an issue, if the act or conduct of the party charged with negligence, or whose duty it is to use due and ordinary care, is so clearly and palpably negligent that all reasonable minds would pronounce it so without hesitation or dissent, then the court may state to the jury by instruction that such act constitutes negligence.[76] Also, where the admitted facts are such that no other conclusion could be reached than that of negligence it then becomes a question of law.[77]

§ 184. Instructions improper—Illustrations.—Charging the jury that if the defendant's employés negligently backed a freight train against the plaintiff while he was waiting to board a passenger train, and that such negligence was the proximate cause of the accident, or if such employés negligently failed to ring a bell or blow a whistle, and such negligence was the proximate cause of the injury, or if such employés negligently backed said train towards a crowd of people, one of whom was the plaintiff, without a lookout on it to give notice of its approach, and such negligence was the proximate cause of the injury to the plaintiff, they should find for the plaintiff, unless he was guilty of contributory negligence, is improper, in that it invades the province of the jury on the weight of the evidence.[78]

An instruction stating that it is the duty of a person approaching a railroad crossing to exercise ordinary care, and if, in the exercise of such care, it was the plaintiff's duty to stop before

[74] North C. St. R. Co. v. Williams, 140 Ill. 281, 29 N. E. 672; McDonough v. Metropolitan R. Co. 137 Mass. 210; Eppendorff v. Brooklyn City & N. R. Co. 69 N. Y. S. 195; Briggs v. Union St. R. Co. 148 Mass. 72, 19 N. E. 19; Germantown Pass. R. Co. v. Walling, 97 Pa. St. 55; Lubsenz v. Metropolitan St. R. Co. 76 N. Y. S. 411, 72 App. Div. 181.

[75] Kirby v. Southern R. Co. 63 S. Car. 494, 41 S. E. 765.

[76] Hoehn v. Chicago St. L. R. Co. 152 Ill. 229, 38 N. E. 549; Lake S. & M. S. R. Co. v. Johnson, 135 Ill. 647, 26 N. E. 510; Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 162, 62 N. E. 831; Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 636.

[77] Exchange Bank v. Trumble, 108 Ky. 234, 56 S. W. 156.

[78] St. Louis S. W. R. Co. v. Casedy (Tex. Cv. App.), 40 S. W. 193. See Houston & T. C. R. Co. v. Jones, 16 Tex. Cv. App. 179, 40 S. W. 745.

driving up on the railway and he failed to do so, the jury should find for the defendant; and so, if in the exercise of such care, it was his duty to look and listen for a train and he failed to do so, they should find for the defendant, is improper; it invades the province of the jury in determining the facts and the weight of the evidence.[79]

An instruction in a suit for personal injury which charges the jury that it became the duty of the plaintiff when going upon the defendant's cars to exercise due care and caution, use her eyes, and act with reasonable care and judgment for her own safety, more especially if she found the car unusually overcrowded with passengers, is erroneous; and in lieu of it the court should have told the jury that it was incumbent on the plaintiff while on the car to exercise such care and caution as might be reasonably expected of a person of ordinary prudence situated as she was.[80]

§ 185. Remarks and conduct of court influencing jury.—"The influence of the trial judge upon the jury is necessarily great because of his authoritative position, and by words or actions he may materially prejudice the rights of a party. By word or conduct he may, on the one hand, support the character or testimony of a witness, or, on the other, may destroy the same, in the estimation of the jury, and thus his personal influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the others."[81]

Where the court in charging the jury says: "When you want to give somebody something as a gift you take it out of your own pocket, and not out of the pocket of some one else; in other words, let us have fair play," it invades the province of the jury. Such remark amounts to telling the jury that a verdict for the plaintiff would be a gift from the defendant to the plaintiff.[82] For the judge to state to the jury that "it seems to me that the plaintiff has made out the better case"

[79] Missouri, K. & T. R. Co. v. Rogers (Tex. Cv. App.), 40 S. W. 849.

[80] Davis v. Paducah R. & L. Co. 24 Ky. 135, 68 S. W. 140.

[81] Blashfield Instructions, &c. § 50, p. 125. Citing McMinn v. Whalen, 27 Cal. 320; S. v. Harkin, 7 Nev. 377; Farhman v. City of Huntsville, 54 Ala. 263; Andreas v. Ketcham, 77 Ill. 377.

[82] Varner v. Western & A. R. Co. 108 Ga. 813, 34 S. E. 166.

is error where the evidence is such as would warrant a verdict for either party.[83] A remark by the court that "it is some times said that parties cannot conscientiously agree to a verdict, there is no conscience in the case, it is simply a question of judgment," was held erroneous as directing the jury to eliminate conscience.[84] The court not being satisfied with the amount of damages arrived at by the jury for the plaintiff on a charge of fraud asked them to further consider the question; and shortly afterwards they returned another verdict with more than double the amount of the former verdict. This was held error, in view of the fact of there being material evidence tending to reduce the amount of damages claimed.[85]

§ 186. Instructions urging jury to agree.—It is not error for the court in charging the jury to instruct them that it is their duty to try to come to an agreement as to their verdict.[86] And so the court may properly instruct the jury to revolve the subject matter of the suit in their minds, and discuss it among themselves in the jury room.[87] But it is improper for the court to state to the jury, where they have failed to agree, that if there is a large majority of the jury on one side, perhaps the minority would yield to the majority by further considering the case.[88] Any statement by the court in charging the jury, suggesting that they are authorized to reach a verdict by compromising their differences, is highly improper. Thus, for instance, for the court to say that "the law, which requires unanimity on the part of the jury to render a verdict, expects and will tolerate reasonable compromise and fair concessions", is erroneous.[89]

§ 187. Instructions attempting to coerce jury.—The court in

[83] Samuel v. Knight, 9 Pa. Super. Ct. 352.

[84] Miller v. Miller, 187 Pa. St. 572, 41 Atl. 277.

[85] Schoefield v. Gear Pulley Co. 71 Conn. 1, 40 Atl. 1064.

[86] Wheeler v. Thomas, 69 Conn. 577, 35 Atl. 499, 39 L. R. A. 794, Instructions tending to encourage a disagreement are improper, Chicago & E. I. R. Co. v. Rains, 203 Ill. 423, 67 N. E. 840.

[87] Hand v. Agen, 96 Wis. 493, 71 N. W. 899.

[88] Sargent v. Lawrence (Tex. Cr. App.), 40 S. W. 1075.

[89] Richardson v. Coleman, 131 Ind. 210, 29 N. E. 909; Clem v. S. 42 Ind. 420; Southern Ins. Co. v. White, 58 Ark. 277, 24 S. W. 425. See, also, Goodsell v. Seeley, 46 Mich. 623, 10 N. W. 44; Cranston v. New York C. & H. R. Co. 103 N. Y. 614, 9 N. E. 500; Edens v. Hannibal & St. J. R. Co. 72 Mo. 212.

charging the jury should guard against making any statement having a tendency to coerce them into reaching a verdict.[90] For the court to impress upon the jury the importance of the case and urge them to come to an agreement, and for that purpose to direct them to retire again for further deliberation, is error.[91] Any statement by the court having a tendency to impress the jury with the idea that the court will be obliged to keep them together until they reach a verdict is improper as tending to coerce the jury to come to an agreement. Thus, for instance, it is error for the court to call the attention of the jury to the costs to the county for each day the court remains in session, and urge them to struggle together until they reach a verdict.[92]

So, after the jury have spent several hours in their efforts to reach a verdict, and report their failure to agree because of one of the jurors holding out against all the others, it is error for the court to speak to them concerning the expense incurred in trying the case; that the court trusts that every juror is acting rationally in the matter, and that nobody is acting from a dogmatic spirit merely for the purpose of asserting his opinion.[93] It is also error for the court to say that it is no credit to a man merely because he has an opinion to stubbornly stick to it.[94]

§ 188. Instructions not attempting to coerce jury.—But there are cases holding that a court by instructions may insist on an agreement, and may otherwise, to a certain extent, attempt to coerce the jury into an agreement. Thus it has been held not to be error for the court to say to the jury on their announc-

[90] Hodges v. O'Brien, 113 Wis. 97, 88 N. W. 97.

[91] S. v. Dudoussat, 47 La. Ann. 977, 17 So. 685. See Cox v. Peltier, 159 Ind. 365, 65 N. E. 6.

[92] Hodges v. O'Brien, 113 Wis. 97, 88 N. W. 97; Chesapeake, O. & S. W. R. Co. v. Barlow, 86 Tenn. 537, 8 S. W. 147; Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19; Richardson v. Coleman, 131 Ind. 210, 29 N. E. 909; S. v. Hill, 91 Mo. 423, 4 S. W. 121. See, also, Perkins v. S. 50 Ala. 154. Contra: Sigsbee v. S. 43 Fla. 524, 30 So. 816; Niles v. Sprague, 13 Iowa, 198.

[93] McPeak v. Missouri Pac. R. Co. 128 Mo. 617, 30 S. W. 170; Stondt v. Shepherd, 73 Mich. 58; Odette v. S. 90 Wis. 258, 62 N. W. 1054. See, also, Mahoney v. San Francisco & S. M. R. Co. 110 Cal. 471, 42 Pac. 968. Contra. S. v. Gorham, 67 Vt. 365, 31 Atl. 845; Jordan v. S. (Tex. Cr. App.), 30 S. W. 445; Johnson v. S. 60 Ark. 45, 24 S. W. 792.

[94] Randalp v. Lampkin, 90 Ky. 551, 14 S. W. 538, 10 L. R. A. 87.

ing that they could not agree, that "this case is submitted to you for decision, and not for disagreement. I think I will let you give it a further trial."[95] Nor is it error for the court to direct the jury that if they should not agree within a certain time they should, on reaching a verdict, seal it and then separate, and return to court on a day named, to which the court would stand adjourned.[96] Or where the jury have been considering a case two or three days it is not improper for the court to express to them its regrets that they have not reached an agreement; that the case must eventually be determined by a jury; that if they do not agree the jury system that far is a failure. The court therefore directs the jury to return to their room and make another effort to come to an agreement.[97]

The court, in the exercise of a proper discretion, may direct the jury to retire for further deliberation, even after a second announcement that they could not agree.[98] It is not improper for the court to state to the jury that they should reason together and arrive at some kind of a verdict, and to continue their deliberations until they reach an agreement. Such a charge is not a threat to keep the jury out until they agree.[99] It has also been held not to be error for the court to say to the jury on their return into court for additional instructions, that it is your duty to decide the case if you can conscientiously do so; that you should listen to the arguments of each other with a disposition to be convinced; that if much the larger number favor a conviction, a dissenting juror should consider whether his doubt is a reasonable one, and that if a majority favor an acquittal the minority should consider whether they may not reasonably be mistaken in their judgment.[100]

[95] German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 70 N. W. 769.

[96] Darlington v. City of Allegheny, 189 Pa. St. 202, 42 Atl. 112. See Burgess v. Singer Mfg. Co. (Tex. Cv. App.), 30 S. W. 1110.

[97] S. v. Pierce, 136 Mo. 34, 37 S. W. 815; Com. v. Kelly, 165 Mass. 175, 42 N. E. 573. See Ter. v. Griego, 8 N. Mex. 133, 42 Pac. 81.

[98] Lambright v. S. 34 Fla. 564, 16 So. 582.

[99] Odette v. S. 90 Wis. 258, 62 N. W. 1054; Jackson v. S. 91 Wis. 267, 64 N. W. 838; Warlick v. Plonk, 103 N. Car. 81, 9 S. E. 190; S. v. Gorham, 67 Vt. 371, 31 Atl. 845; Wheeler v. Thomas, 67 Conn. 577, 35 Atl. 499; S. v. Hawkins, 18 Ore. 476, 23 Pac. 475; Cowan v. Umbagog Pulp Co. 91 Me. 26, 39 Atl. 340; Krack v. Wolf, 39 Ind. 88.

[100] Allen v. U. S. 164 U. S. 492, 17 Sup. Ct. 154. See Ter. v. Griego, 8 N. Mex. 133, 42 Pac. 81; Odette v. S. 90 Wis. 258, 62 N. W. 1054.

§ 189. When court may comment on evidence and express opinion.—But in the federal courts the rule is well settled that the court in charging the jury may comment upon the evidence and express an opinion as to its weight, what it proves or tends to prove or does not prove, provided the jury are ultimately left at liberty to determine the facts in issue.[101] And the same rule prevails in some of the state courts.[102] The constitutional and statutory provisions of the states which prohibit the courts from commenting on or expressing an opinion as to the weight of the evidence have no application to the practice in the federal courts and some of the state courts.[103] "That the judge may properly state to the jury his opinion as to what facts are proved or not proved by the evidence . . . if he also instructs them that they are not bound by his opinions on such matters, but that it is their duty as jurors to consider the evidence, and find the facts therefrom, has been the uniform holding of the federal courts."[104] The instructions shall control as to the law of the case, and while the court may express an opinion on the weight of the evidence, as well as the credibility of the witnesses, yet the jury should be left free to exercise an independent judgment in determining the facts.[105] It is proper for the court to comment fairly and impartially on the testimony for the pur-

[101] Aerheart v. St. Louis & S. R. Co. 90 Fed. 907; Hart v. U. S. 84 Fed. 799, 28 C. C. A. 612. See Herrick v. Quigley, 101 Fed. 187, 41 C. C. A. 294; Martin v. Hughes, 98 Fed. 556; Allis v. U. S. 155 U. S. 117, 15 Sup. Ct. 36; U. S. v. Schneider, 21 D. C. 381; U. S. v. Connelly, 1 Fed. 779, 9 Biss. 338; Com. v. Berchine, 168 Pa. St. 603, 32 Atl. 109; Walls v. Southern B. T. T. Co. 66 Fed. 453; Lesser Cotton Co. v. St. L. I. M. & S. R. Co. 114 Fed. 133; Freese v. Kemplay, 118 Fed. 428; Ching v. U. S. 118 Fed. 538; First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Wiborg v. U. S. 163 U. S. 632, 16 Sup. Ct. 1127; Treece v. American Asso. (C. C. A.), 122 Fed. 598; Nome Beach L. & T. Co. v. Munich Assur. Co. 123 Fed. 820.

[102] Foley v. Longhran, 60 N. J. L. 468, 39 Atl. 358, 38 Atl. 960; McCormick v. McCormick, 194 Pa. St. 107, 45 Atl. 88; Cook v. Steinert & Sons Co. 69 Conn. 91, 36 Atl. 1008; First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Pool v. White, 175 Pa. St. 459, 34 Atl. 801, (transaction complicated); Rosevear v. Borough, etc. 169 Pa. St. 555, 32 Atl. 548; Price v. Hamscher, 174 Pa. St. 73, 34 Atl. 546.

[103] Nudd v. Burrows, 91 U. S. 441; St. Louis, I. M. & S. R. Co. v. Vickers, 122 U. S. 360, 7 Sup. Ct. 1216.

[104] Kerr v. Modern Woodman, 117 Fed. 593.

[105] Mobile & O. R. Co. v. Wilson, 76 Fed. 122, 34 L. R. A. 477.

pose of more clearly defining the issues and to assist the jury in reaching a just conclusion.[106]

§ 190. Illustrations of the rule.—Thus, in the federal courts, for the court, in charging the jury, to state that, under the circumstances, a certain act amounts to negligence, is not error where the charge left it to the jury to determine the question of negligence.[107] A charge that "it cannot be doubted under the evidence that the place where the plaintiff received his injury was a most dangerous one," is not error, if the jury are also instructed that they are the exclusive judges of the weight of the evidence.[108] Under this rule it has been held that a federal judge, in commenting upon the evidence, by saying that he could not see "how the defendant can be acquitted," is not cause for reversal where it appears that the court correctly stated the law and expressly left the jury free to determine the facts.[109]

§ 191. Instructions reviewing the evidence.—Under the above rule the judge of the court should, in charging the jury, call their attention to the important matters of evidence bearing on the issues, and may express an opinion as to its weight and relevancy.[110] But instructions designed to review the evidence are not required to refer to every item in detail; it is sufficient to give a general review of the evidence, fairly showing the contentions of the parties.[111]

It is not necessary to state the testimony of each witness separately in reviewing the evidence. The witnesses may be

[106] Sommers v. Carbon Hill Coal Co. 91 Fed. 337; S. v. Means, 95 Me. 364, 50 Atl. 30.

[107] Chicago, R. I. & P. R. Co. v. Stahley, 62 Fed. 363.

[108] Illinois Cent. R. Co. v. Davidson, 76 Fed. 517.

[109] Endleman v. U. S. 86 Fed. 456. See Bank of Commerce v. Bright, 77 Fed. 946.

[110] Appeal of Sturdevant, 71 Conn. 392, 42 Atl. 70; Schoefield, Gear & Pulley Co. v. Schoefield, 71 Conn. 11, 40 Atl. 1046; S. v. Means, 9 Me. 364, 50 Atl. 30. But see Com. v. Walsh, 162 Mass. 242, 38 N. E. 436; Fineburg v. Second & Third St. P. R. Co. 182 Pa. St. 97, 37 Atl. 925.

[111] Taylor v. Burrell, 7 Pa. Super. Ct. 461; Bank of Asheville v. Summer, 119 N. Car. 591, 26 S. E. 129; Allis v. U. S. 155 U. S. 117, 15 Sup. Ct. 36; Borham v. Davis, 146 Pa. St. 72, 23 Atl. 160. See Halfman v. Pennsylvania Boiler Ins. Co. 160 Pa. St. 202, 28 Atl. 837; S. v. Ussery, 118 N. Car. 1177, 24 S. E. 414; Com. v. Warner, 13 Pa. Super. Ct. 461, the summary must be accurate as far as attempted.

grouped and the substance of their testimony stated.[112] Nor is it necessary for the court to review the evidence on the one side or the other, or comment upon the particular corroborating circumstances, where a case turns upon some single matter of fact which the court plainly submits to the jury.[113] And where the court states to the jury that there is one question for them to determine, a failure to instruct them to disregard a certain other issue is not error.[114]

The court may, in its discretion, express an opinion on the weight of the evidence, but it is not bound to do so.[115] Especially where the evidence is conflicting, it is not error if the court fails to express an opinion on the weight of the evidence.[116] And in the absence of a request the court is not required even to call the attention of the jury to a conflict between the testimony of the witnesses of the parties to the suit.[117] It is not improper, however, to instruct on the effect of conflicting evidence.[118] And if the court in stating the evidence makes a mistake in quoting the testimony it is the duty of the party affected to call the attention of the court to such mistake immediately after the charge is finished.[119] And if the party so

[112] Maynard v. Tyler, 168 Mass. 107, 46 N. E. 413; Krepps v. Carlise, 157 Pa. St. 358, 27 Atl. 741; P. v. Doyell, 48 Cal. 85.

[113] Laner v. Yetzer, 3 Pa. Super. Ct. 461.

[114] Davis v. Alas Assur. Co. 16 Wash. 232, 47 Pac. 885.

[115] S. v. Main, 75 Conn. 55, 52 Atl. 257; Cohen v. Pemberton, 53 Conn. 235, 2 Atl. 315, 5 Atl. 682; Doon v. Ravey, 49 Vt. 293; Shank v. S. 25 Ind. 208. See, also, Breese v. United States, 106 Fed. 680; George v. Stubbs, 26 Me. 242; Bruch v. Carter, 32 N. J. L. 565.

[116] Ide v. Lake Tp. (Pa. Com. Pl.), 9 Kulp, 192. See Balph v. Liberty Nat. Bank, 179 Pa. St. 430, 36 Atl. 337.

[117] Balph v. Liberty Nat. Bank, 179 Pa. St. 430, 36 Atl. 337.

[118] Louisville & N. R. Co. v. York, 128 Ala. 305, 30 S. E. 676.

[119] Mann v. Cowan, 8 Pa. Super. Ct. 30; Grows v. Maine C. R. Co. 69 Me. 412; Muetze v. Tuteur, 77 Wis. 236, 46 N. W. 123; S. v. Davis, 27 S. Car. 609, 4 S. E. 567. The judge of the court should not state to the jury his recollection of what a witness may have testified to in a former trial, P. v. Corey, 157 N. Y. 332, 51 N. E. 1024. Held to be improper comment on the facts or weight of the evidence: Yoacham v. McCurdy, 27 Tex. Cv. App. 183, 65 S. W. 213; Berry v. S. (Tex. Cr. App.) 38 S. W. 812; Kibler v. Com. 94 Va. 804, 26 S. E. 858; Braun v. S. (Tex. Cr. App.), 39 S. W. 940; Santee v. S. (Tex. Cr. App.), 37 S. W. 436; Alexander v. Bank of Lebenon (Tex. Cv. App.), 47 S. W. 840; S. v. Collins, 47 La. Ann. 578, 17 So. 128; Van Camp Hardware Co. v. O'Brien (Ind. App.) 62 N. E. 464; S. v. Hyde, 20 Wash. 234, 55 Pac. 49; Western U. Tel. Co. v. Burgess (Tex. Cv. App.), 56 S. W. 237; Lincoln v. City of Detroit, 101 Mich. 245, 59 N. W. 617; Hensel v. Haas, 101 Mich. 443, 59 N. W. 808; Meadows v. Truesdell (Tex.

affected shall fail to do so, by such failure he waives the right to appeal on the ground of the court's mistake.

Cv. App.), 56 S. W. 932; Herrington v. Guernsey, 177 Pa. St. 175, 35 Atl. 603; Texas & N. O. R. Co. v. Mortenson, 27 Tex. Cv. App. 806, 66 S. W. 99; Smith v. Gulf, W. T. & P. R. Co. (Tex. Cv. App.), 65 S. W. 88; Sullivan v. Market St. R. Co. 136 Cal. 479, 69 Pac. 143; Earle v. Poat, 63 S. Car. 439, 41 S. E. 525; St. L. S. W. R. Co. v. Sibley, 29 Tex. Cv. App. 396, 68 S. W. 516; Johnson v. Stone, 69 Miss. 826, 13 So. 858; Clifford v. Lee (Tex. Cv. App.), 23 S. W. 843; Blumeno v. Grand Rapids & I. B. R. Co. 101 Mich. 325, 59 N. W. 594; P. v. Totman, 135 Cal. 133, 67 Pac. 51; S. v. McDowell, 129 N. Car. 523, 39 S. E. 840; Hickory v. U. S. 160 U. S. 408, 16 Sup. Ct. 327; Hudson v. S. 43 Tex. Cr. App. 420, 66 S. W. 668; Parker v. S. 43 Tex. Cr. App. 526, 67 S. W. 121; Remner v. S. 43 Tex. Cr. App. 347, 65 S. W. 1102; Wallace v. S. (Tex. Cr. App.), 66 S. W. 1102; Harris v. S. (Tex. Cr. App.) 65 S. W. 921; Winter v. S. 133 Ala. 176, 32 So. 125; Reese v. S. (Tex. Cr. App.), 68 S. W. 283; Coffin v. Brown, 94 Md. 190, 50 Atl. 567; Moore v. S. (Tex. Cr. App.), 68 S. W. 279; Faulkner v. King, 130 N. Car. 494, 41 S. E. 885; Crawford v. S. 117 Ga. 247, 43 S. E. 762; McDommell v. De Los Fuentes, 7 Tex. Cv. App. 136, 26 S. W. 792. Held not improper comment on the weight of the evidence: Moore v. Dickinson, 39 S. Car. 441, 17 S. E. 998; Miles v. Plant, 18 Pa. Super. Ct. 80; St. Louis S. W. R. Co. v. Spivey (Tex. Cv. App.) 73 S. W. 973; Halfman v. Pennsylvania Boiler Co. 160 Pa. St. 202, 28 Atl. 837; Wills v. Lance, 28 Ore. 371, 43 Pac. 487; Files v. S. 36 Tex. Cr. App. 206, 36 S. W. 93. Held not intimating an opinion on the evidence in the following cases: P. v. Crotty, 47 N. Y. S. 845, 22 App. Div. 77; S. v. Shaw, 102 Ga. 660, 29 S. E. 477; Collins v. S. 39 Tex. Cr. App. 441, 46 S. W. 933; Morris v. S. 39 Tex. Cr. App. 371, 46 S. W. 253; P. v. Slater, 119 Cal. 620, 51 Pac. 957; Reynols v. S. 147 Ind. 3, 46 N. E. 31; Smith v. Dawley, 92 Iowa, 312, 60 N. W. 625; S. v. Derrick, 44 S. Car. 344, 22 S. E. 337; Newport v. S. 140 Ind. 299, 39 N. E. 926; Missouri, K. & T. R. Co. v. Magee (Tex. Cv. App.), 49 S. W. 928; Anderson v. McDonald, 31 Wash. 274, 71 Pac. 1037; Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31; Drumheller v. American Surety Co. 30 Wash. 530, 71 Pac. 25; Harris v. S. 97 Ga. 350, 23 S. E. 993; Graham v. Frazier, 49 Neb. 90, 68 N. W. 367; Texas & N. O. R. Co. v. Echols, 17 Tex. Cv. App. 677, 41 S. W. 488; Texas, &c. R. Co. v. Jones (Tex. Cv. App.), 39 S. W. 124; Houston, E. & W. T. R. Co. v. Granberry, 16 Tex. Cv. App. 391, 40 S. W. 1062; Seiling v. Clark, 41 N. Y. S. 982, 18 Misc. 464; Cook v. Bartlett, 179 Mass. 576, 61 N. E. 266; Wylie v. Commercial & F. Bank, 63 S. Car. 406, 41 S. E. 504; Cooper v. Ford (Tex. Cv. App.), 69 S. W. 487; Missouri, K. & T. R. Co. v. Johnson (Tex. Cv. App.), 67 S. W. 769; Davis v. Atlanta & C. A. L. R. Co. 63 S. Car. 370, 41 S. E. 468. Held invading the province of the jury: Clewis v. Malone, 131 Ala. 465, 31 So. 596; Berez v. San Antonio & A. P. R. Co. (Tex. Cv. App.), 67 S. W. 137; Lamphere v. S. 114 Wis. 193, 89 N. W. 128; Watkins v. S. 133 Ala. 88, 32 So. 627; Nelson v. S. 43 Tex. Cr. App. 553, 67 S. W. 320. Held not invading the province of the jury in the following cases: P. v. Spiegel, 143 N. Y. 107, 38 N. E. 284; P. v. Johnson, 104 Cal. 418, 38 Pac. 91; S. v. Dill, 48 S. Car. 249, 26 S. E. 567; S. v. Atkins, 49 S. Car. 481, 27 S. E. 484; P. v. Howard, 135 Cal. 266, 67 Pac. 148; P. v. Totman, 135 Cal. 133, 67 Pac. 51; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; French v. Seattle Tr. Co. 26 Wash. 264, 66 Pac. 404; Galveston, H. & N. R. Co. v. Newport, 26 Tex. Cv. App. 583, 65 S. W. 657; Brashington v. South B. R. Co. 62 S. Car. 325, 40 S. E. 665; American T. & T. Co. v. Kersh, 27 Tex. Cv. App. 127, 66 S. W. 74.

CHAPTER VII.

FACTS ASSUMED.

Sec.
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§ 192. **Instructions assuming facts generally.**—Any assumption of facts in dispute which must be determined by the jury is an infringement of their province, and if the rights of a party are thereby affected, such assumption is error.[1] Instructions which assume the existence of material facts are, as a general rule, erroneous, especially if unsupported by evidence.[2]

[1] P. v. Matthai, 135 Cal. 442, 67 Pac. 694; Cline v. S. 43 Ohio St. 332, 1 N. E. 22; Momence Stone Co. v. Turrell, 205 Ill. 524, 68 N. E. 1078; S. v. Bonner (Mo.), 77 S. W. 463; Smith v. Sovereign, &c. (Mo.), 77 S. W. 867; Dobson v. Southern R. Co. 132 N. Car. 900, 44 S. E. 593; Wilson v. Huguenin, 117 Ga. 546, 43 S. E. 857; Birmingham, &c. Co. v. Mullen (Ala.), 35 So. 701; Choctaw, &c. R. Co. v. Deperade (Okl.), 71 Pac. 629; Rogers v. Manhattan, &c. Ins. Co. 138 Cal. 285, 71 Pac. 348; Selensky v. Chicago, &c. R Co. 120 Iowa, 113, 94 N. W. 272; Lydick v. Gill (Neb.), 94 N. W. 109; New Omaha T. H. &c. Co. v. Rombold (Neb.), 97 N. W. 1030; Kahn v. Triest-R. &c. Co. 139 Cal. 340, 73 Pac. 164; Lawrence v. Westlake (Mont.), 73 Pac. 119; Northern Ohio R. Co. v. Rigby, 69 Ohio, 184, 68 N. E. 1046; McHenry v. Bulifant (Pa.), 56 Atl. 226; Karl v. Juniata Co. 206 Pa. 633, 56 Atl. 78; Riser v. Southern R. Co. (S. Car.), 46 S. E. 47; Dodd v. Guiseffi, 100 Mo. App. 311, 73 S. W. 304; Nabours v. McCord (Tex. Cv. App.), 75 S. W. 827; Bumgardner v. Southern R. Co. 132 N. Car. 438, 43 S. E. 948; Rock Island, &c. Co. v. Pohlman, 210 Ill. 139.

[2] See Newman v. Schmilker, 181 Ill. 406; Langdon v. P. 133 Ill. 404,

Instructions which assume that there is evidence before the jury tending to prove material facts, when in fact there is no such evidence, are improper and generally erroneous.[3] An instruction which states that there is no evidence to prove a material fact in issue when there is such evidence, though slight or equivocal, is erroneous.[4]

The giving of an instruction intimating or implying that there is no evidence touching a certain phase of a case is improper,

24 N. E. 874; Callaghan v. Myers, 89 Ill. 566; Walcot v. Heath, 78 Ill. 433; Sugar Creek Min. Co. v. Peterson, 177 Ill. 329, 52 N. E. 475; Dina v. S. (Tex. Cr. App.), 78 S. W. 230; Gaines v. S. 99 Ga. 703, 26 S. E. 760; Wilcox v. Kinzie, 4 Ill. (3 Scam.), 218; East & W. R. Co. v. Waldrop, 114 Ga. 289, 40 S. E. 268; McCullough v. Minneapolis, St. P. & S. S. Co. 101 Mich. 234, 59 N. W. 618; Weybright v. Fleming, 40 Ohio St. 55; Schweinfurth v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 223, 54 N. E. 89; Birmingham R. L. & P. Co. v. Mullen (Ala.), 35 So. 204; Dunseath v. Pittsburg A. & M. Tr. Co. 161, Pa. St. 124, 28 Atl. 1021; O'Flaherty v. Mann, 196 Ill. 304, 63 N. E. 727; Bell v. Washington Cedar-Shingle Co. 8 Wash. 27, 35 Pac. 405; O'Neill v. Blase, 94 Mo. App. 648, 68 S. W. 764; Chicago, B. & Q. R. Co. v. Anderson, 38 Neb. 112, 56 N. W. 794; Dixon v. S. 113 Ga. 1039, 39 S. E. 846 (confession); Rettig v. Fifth Ave. Tr. Co. 26 N. Y. S. 896, 6 Misc. 328; Williams v. S. 46 Neb. 704, 65 N. W. 783; Haupt v. Haupt, 157 Pa. St. 469, 27 Atl. 768; Dady v. Condit, 188 Ill. 234, 58 N. E. 900; Overall v. Armstrong (Tex. Cv. App.), 25 S. W. 440; Cox v. S. 68 Ark. 462, 60 S. W. 27; McDonald v. Beall, 55 Ga. 288; French v. Sale, 63 Miss. 386; St. Louis S. W. R. Co. v. Smith (Tex. Cv. App.), 63 S. W. 1064; Houston v. Com. 87 Va. 257, 12 S. E. 385; Willis v. Hudson, 72 Tex. 598, 10 S. W. 713; St. Louis, K. & N. W. R. Co. v. St. Louis U. S. Y. Co. 120 Mo. 541, 25 S. W. 399; Com. v. Light, 195 Pa. St. 220, 45 Atl. 933; Weybright v. Fleming, 40 Ohio St. 52; P. v. Williams, 17 Cal. 142 (direct or indirect); Hill v. Spear, 50 N. H. 253; Brower v. Edson, 47 Mich. 91, 10 N. W. 121; Chicago W. D. R. Co. v. Mills, 91 Ill. 39; Hood v. Olin, 68 Mich. 165, 36 N. W. 177; Kidd v. S. 83 Ala. 58, 3 So. 442; Kelly v. Eby, 141 Pa. 176, 21 Atl. 512; Bowie v. Spaids, 26 Neb. 635, 42 N. W. 700; Chase v. Horton, 143 Mass. 118, 9 N. E. 31; P. v. Cotta, 49 Cal. 116; King v. S. (Miss.), 23 So. 166; Saffold v. S. 76 Miss. 258, 24 So. 314; Com. v. Light, 195 Pa. St. 220 (as to receiving stolen property), 45 Atl. 933.

[3] Chicago, B. & Q. R. Co. v. Harwood, 90 Ill. 429; City of Chicago v. Bixby, 84 Ill. 83; Michigan, S. & N. I. R. Co. v. Shelton, 66 Ill. 425; McCormick v. McGaffray, 55 N. Y. S. 574, 25 Misc. 786; Chichester v. Whitehead, 51 Ill. 259; Ter. v. Turner (Ariz.), 31 Pac. 368; Adams v. Smith, 58 Ill. 421; Roche v. Baldwin, 135 Cal. 522, 69 Pac. 903; Waters v. Kansas City, 94 Mo. App. 413, 68 S. W. 366; Hall v. S. 130 Ala. 45, 30 So. 422; Hall v. S. 134 Ala. 90, 32 So. 750; Thomas v. S. 133 Ala. 139, 32 So. 250; Crittenden v. S. 134 Ala. 145, 32 So. 273; Barker v. S. 48 Ind. 163; Perkins v. Attaway, 14 Ga. 27.

[4] Prairie State L. & T. Co. v. Doig, 70 Ill. 52; Avery & Son v. Meek, 16 Ky. L. R. 384, 28 S. W. 337; Georgia H. Ins. Co. v. Allen, 128 Ala. 451, 30 So. 537; Zibbell v. City of Grand Rapids, 129 Mich. 659, 89 N. W. 563; Sander v. S. 134 Ala. 74, 32 So. 654 (conspiracy); Cupps v. S. (Wis.), 97 N. W. 218.

unless there actually is no evidence on the point or question to which it relates.[5] So to assume or state in an instruction that a fact has been established when there is no evidence to prove such fact is error.[6] Also the giving of an instruction which assumes the existence of a fact when there is evidence tending to prove the contrary is error.[7]

§ 193. Instructions assuming facts—Illustrations.—An instruction reciting that the state has introduced evidence tending to prove the theft of property other than that alleged in the indictment, at the same time and place, when there is no evidence tending to show such theft, is prejudicial; and although no exception was taken to the charge, it affords ground for reversal.[8] In a will contest an instruction which suggests that the will in question was made under the influence of partial insanity, where there was no evidence of any delusions or mania, is improper and erroneous.[9] And an instruction which assumes that other witnesses were present, who had better opportunities of observing at the time of the execution of a will than the subscribing witnesses, is erroneous when there is no evidence tending to prove such fact.[10]

To tell the jury by instruction that the plaintiff is entitled to recover all damages proved to have been sustained by him on account of the trespass committed by the defendant on the plaintiff's premises, as alleged in the declaration, is error, in assuming that the defendant committed the trespass.[11] So an

[5] Barker v. S. 40 Fla. 178, 24 So. 69; Kildow v. Irick (Tex. Cv. App.), 33 S. W. 315.

[6] Camden A. R. Co. v. Williams, 61 N. J. L. 646, 40 Atl. 634; Dougherty v. King, 48 N Y. S. 110; American Ins. Co. v. Crawford, 89 Ill. 65; Fullam v. Rose, 181 Pa. St. 138, 37 Atl. 197; Kildow v. Irick (Tex. Cv. App.), 33 S. W. 315; Wilson v. Crosby, 109 Mich. 449, 67 N. W. 693; Bentley v. Standard F. Ins. Co. 40 W. Va. 729, 23 S. E. 584; Lewis v. Rice, 61 Mich. 97, 27 N. W. 867; Cropper v. Pittman, 13 Md. 190.

[7] Walters v. American Jewelry & M. Co. 114 Ga. 564, 40 S. E. 803; Leslie v. Smith, 32 Mich. 64; Bowman v. Roberts, 58 Miss. 126; Moffitt v. Colkin, 35 Mo. 453; Jones v. McMillon, 129 Mich. 86, 88 N. W. 206; Stern v. P. 102 Ill. 555. See Mathis v. S. 33 Tex. Cr. App. 605, 28 S. W. 817.

[8] Wilson v. S. (Tex. Cr. App.), 34 S. W 284; Hayes v. S. 36 Tex. Cr. App. 146, 35 S. W. 983.

[9] Neiman v. Schmitker, 181 Ill. 406, 55 N. E. 151; Langdon v. P. 133 Ill. 404, 24 N. E. 874; Webster v. Yorty, 194 Ill. 408, 62 N. E. 707, 62 N. E. 907.

[10] Neiman v. Schmitker, 181 Ill. 404, 55 N. E. 151; Owens v. S. 39 Tex. Cr. App. 391, 46 S. W. 240.

[11] Small v. Brainard, 44 Ill. 355; Hawk v. Ridgway, 33 Ill. 473; Steele v. Davis, 75 Ind. 197; Mohr v. Kinnane, 85 Ill. App. 447 (assault and battery).

instruction stating that "if you find the plaintiff's action is not barred you will, from the evidence, estimate the amount of his damages caused by delay in receiving and transporting his cattle, if you find there was any unreasonable delay," is erroneous, in that it assumes that the cattle had been damaged by delay.[12] In an action for assault and battery a charge that "if the jury find for the plaintiff they have the right to take into consideration, in estimating the damages, the pecuniary condition of the defendant," is erroneous where the testimony as to malice is conflicting.[13] An instruction stating that "the false, improbable and contradictory statements of the accused, if made, in explaining suspicious circumstance against him are evidences to be considered by the jury," is erroneous, in that it assumes that the statements were false, improbable and contradictory, or that there were suspicious circumstances against him.[14]

§ 194. Instructions not assuming facts—Illustrations.—In an action for personal injury an instruction which states that if the defendants negligently left the ditch without barriers, and that the plaintiff, without fault, fell into it, the jury should find for the plaintiff, is not objectionable as assuming the fact of negligence.[15] An instruction which states that the "plaintiff has sued for injuries alleged to have been received by the negligent act of the railroad company's servants in placing obstructions across a public highway, and without ordinary care, and that the obstructions were a handcar and tools," merely states the allegations claimed by the plaintiff to have been negligence and does not assume negligence.[16]

[12] Gulf, C. & S. F. R. Co. v. White (Tex. Cv. App.), 32 S. W. 322. See St. Louis S. W. R. Co. v. McCullough (Tex. Cv. App.), 32 S. W. 285; Dady v. Condit, 188 Ill. 234, 58 N. E. 900.

[13] Lopez v. Jackson, 80 Miss. 684, 32 So. 117.

[14] Jones v. S. 59 Ark. 417, 27 S. W. 601. See Hellyer v. P. 186 Ill. 550, 58 N. E. 245.

[15] Britton v. City of St. Louis, 120 Mo. 437, 25 S. W. 366. See generally: Richmond Traction Co. v. Wilkinson (Va.), 42 S. E. 622; Mallen v. Waldowiski, 203 Ill. 87, 67 N. E. 409; Jarman v. Rea, 137 Cal. 339, 70 Pac. 216; Chicago, &c. R. Co. v. Gore, 202 Ill. 188, 66 N. E. 1063; San Antonio Trac. Co. v. Welter (Tex. Cv. App.), 77 S. W. 414; Western U. Tel. Co. v. Chambers (Tex. Cv. App.), 77 S. W. 273; Blake v. Austin (Tex. Cv. App.), 75 S. W. 571; St. Louis, &c. R. Co. v. Parks (Tex. Cv. App.), 73 S. W. 439.

[16] International & G. N. R. Co. v. Locke (Tex. Cv. App.), 67 S. W. 1082. See Elledge v. National City & O. R. Co. 100 Cal. 282, 34 Pac. 720-852.

On a charge of keeping a saloon open on Sunday in violation of law an instruction stating that it makes no difference whether the defendant sold any liquor or not, he has no right to let persons into the saloon, does not assume that the defendant allowed persons to enter the saloon on Sunday.[17] An instruction charging that if the defendant wilfully assaulted the plaintiff the jury may assess vindictive damages is not subject to the criticism that it assumes that an assault was made.[18]

§ 195. Assuming facts when evidence is close or conflicting. Where the evidence is close[19] or conflicting, instructions which assume the existence of controverted facts are improper and erroneous;[20] especially are such instructions erroneous where the evidence is conflicting on a vital point in the case.[21] Thus, where an injury to the person becomes a material fact in issue,

[17] P. v. Bowkus, 109 Mich. 360, 67 N. W. 319.

[18] Bailey v. McCance (Va.), 32 S. E. 43. See Bond v. P. 39 Ill. 26.

[19] Mohr v. Kinnane, 85 Ill. App. 447; Myer v. Myer, 86 Ill. App. 417; Conners v. Chingren, 111 Iowa, 437, 82 N. W. 934; Steinmeyer v. P. 95 Ill. 388; Holloway v. Johnson, 129 Ill. 369, 21 N. E. 798.

[20] Means v. Gridley, 164 Pa. St. 387, 30 Atl. 390; Hutton v. Doxsee, 116 Iowa, 13, 89 N. W. 79; Goss v. Colkins, 162 Mass. 492, 39 N. E. 469; Wilber v. Wilber, 129 Ill. 396, 21 N. E. 1076; Mahaffey v. Ferguson, 156 Pa. St. 156, 27 Atl. 21; Lyle v. McInnis (Miss.), 17 So. 510. See Commercial F. Ins. Co. v. Morris, 105 Ala. 498, 18 So. 34; Bradley v. Ohio River & C. R. Co. 126 N. Car. 735, 36 S. E. 181; Baltimore Consol. R. Co. v. S. 91 Md. 506, 40 Atl. 1000; Luckie v. Schneider (Tex. Cv. App.), 57 S. W. 690; Richardson v. Dybedall (S. Dak.), 98 N. W. 164.

[21] Chicago & A. R. Co. v. Rayburn, 153 Ill. 290, 33 N. E. 558, Eller v. P. 153 Ill. 347, 38 N. E. 660; Cannon v. P. 141 Ill. 283, 30 N. E. 1027; Coleman v. Adair, 75 Miss. 660, 23 So. 369; Owen v. Long, 97 Wis. 78, 72 N. W. 364; Scott v. P. 141 Ill. 211, 30 N. E. 329; Griffin v. White, 52 N. Y. S. 807; Gaines v. McAlister, 122 N. Car. 340, 29 S. E. 844; S. v. Johnson, 6 Kas. App. 119, 50 Pac. 907; Germania Fire Ins. Co. v. Klewer, 129 Ill. 611, 22 N. E. 489; Brown v. S. 72 Miss. 997, 17 So. 278; P. v. Long, 104 Cal. 363, 37 Pac. 1031; S. v. Buralli (Nev.), 71 Pac. 532; Bumgardner v. Southern R. Co. 132 N. Car. 438, 43 S. E. 948; Willis v. S. 134 Ala. 429, 33 So. 226; Bohlman v. S. 135 Ala. 45, 33 So. 44; Finch v. Bergins, 89 Ind. 360 (assuming that a party made admissions); Densmore v. S. 67 Ind. 306; Jackson v. S. 71 Ind. 149 (assuming that a crime was committed); Huffman v. Cauble, 86 Ind. 591; Moore v. S. 65 Ind. 382; Barker v. S. 48 Ind. 163; Matthews v. Story, 54 Ind. 417; Wood v. Steinau, 9 S. Dak. 110, 68 N. W. 160; Blue V. L. Co. v. Smith, 48 Neb. 293, 67 N. W. 159; Worswick v. Hunt, 106 Ala. 559, 18 So. 74; S. v. Lewis, 56 Kas. 374, 43 Pac. 265; Wall v. Goodenough, 16 Ill. 415; Bradley v. Coobaugh, 91 Ill. 148, 151; Chicago, W. D. R. Co. v. Mills, 91 Ill. 39; Chicago, B. & Q. R. Co. v. Griffin, 68 Ill. 499, 507; Cusick v. Campbell, 68 Ill. 508; Ward v. Odell Mfg. Co. 123 N. Car. 248, 31 S. E. 495; Morton v. Harvey, 57 Neb. 304, 77 N. W. 808; Bates v. Harte, 124 Ala. 427,

an instruction which assumes that the person's spine was injured, when the evidence as to such fact is conflicting, is erroneous.[22]

A charge that if the jury find for the plaintiff they should give damages in such an amount as they believe will compensate the plaintiff for permanent injury, is improper when the question of permanent injury is in dispute, in that it assumes

26 So. 898; Illinois Cent. R. Co. v. Anderson, 184 Ill. 294, 56 N. E. 331; Wellman v. Jones, 124 Ala. 580, 27 So. 416; Pacific M. L. Ins. Co. v. Walker, 67 Ark. 147, 53 S. W. 675; Duffield v. Delaney, 36 Ill. 258, 261; Conkwright v. P. 35 Ill. 204, 207; Dean v. Ross, 105 Cal. 227, 38 Pac. 912; Fleming v. Wilmington & W. R. Co. 115 N. Car. 676, 20 S. E. 714; Nashville, C. & St. L. R. Co. v. Hammond, 104 Ala. 191, 15 So. 935; Terry v. Beatrice Starch Co. 43 Neb. 866, 62 N. W. 255; White v. Van Horn, 159 U. S. 1, 15 Sup. Ct. 1027; Schultz v. Schultz, 113 Mich. 502, 71 N. W. 854; Metropolitan St. R. Co. v. McClure, 58 Kas. 109, 48 Pac. 566; Maddox v. Newport News & M. V. Co. 18 Ky. L. R. 635, 37 S. W. 494; Missouri, K. & T. R. Co. v. Brown (Tex. Cv. App.), 39 S. W. 326; McCallon v. Cohen (Tex. Cv. App.), 39 S. W. 973; Griffith v. Bergeson, 115 Iowa, 279, 88 N. W. 451; Cleveland, C. C. & St. L. R. Co. v. Best, 169 Ill. 301, 310, 48 N. E. 684; City of Chicago v. Moore, 139 Ill. 201, 208, 28 N. E. 1071; Lake Shore & M. S. R. Co. v. Boderner, 139 Ill. 596, 603, 29 N. E. 692; Illinois Steel Co. v. Schymanowski, 162 Ill. 447, 461, 44 N. E. 876; West C. St. R. Co. v. Estep, 162 Ill. 131, 44 N. E. 404; Peoria & P. N. R. Co. v. Tamplin, 156 Ill. 285, 300, 40 N. E. 960; Chicago & A. R. Co. v. Sanders, 154 Ill. 531, 537, 39 N. E. 481; Lake Shore & M. S. R. Co. v. Parker, 131 Ill. 557, 566, 23 N. E. 237; Chicago, St. L. & P. R. Co. v. Hutchinson, 120 Ill. 587, 592, 11 N. E. 855; Doyle v. S. 39 Fla. 155, 22 So. 272; Williamson v. Tyson, 105 Ala. 644, 17 So. 336; Louisville & N. R. Co. v. York, 128 Ala. 305, 30 S. E. 676; New York, P. & N. R. Co. v. Jones, 94 Md. 24, 50 Atl. 423; Galveston, H. & S. A. R. Co. v. Sanchez (Tex. Cv. App.), 65 S. W. 893; Braden v. Cook, 18 Pa. Super. Ct. 156; Southern Pac. Co. v. Ammons (Tex. Cv. App.), 26 S. W. 135; St. Louis, K. & W. R. Co. v. St. Louis U. Stock Yards (Mo.), 29 S. W. 399; Sample v. Rand, 112 Iowa, 616, 84 N. W. 683; Wadsworth v. Dunnam, 98 Ala. 610, 13 So. 597; Freeman v. Metropolitan St. R. Co. 95 Mo. App. 314, 68 S. W. 1057; Gulf, C. & S. F. R. Co. v. Brown (Tex. Cv. App.), 24 S. W. 918; Steadman v. Keets, 129 Mich. 669, 89 N. W. 555; Duff v. Com. 24 Ky. L. R. 201, 68 S. W. 370 (selling liquor); Rogers v. Manhattan Life Ins. Co. 138 Cal. 285, 71 Pac. 348; Smith v. Dukes, 5 Minn. 373. See generally: Eller v. P. 153 Ill. 347, 38 N. E. 660; Hellyer v. P. 186 Ill. 550, 58 N. E. 245; Cannon v. P. 141 Ill. 282, 30 N. E. 1027; Hoge v. P. 117 Ill. 46, 6 N. E. 796; Barr v. P. 113 Ill. 473; Chambers v. P. 105 Ill. 417; Com. v. McMahon, 145 Pa. St. 413, 22 Atl. 971; S. v. Mackey, 12 Ore. 154, 6 Pac. 648, 5 Am. Cr. R. 536, Metz v. S. 46 Neb. 547, 65 N. W. 190; P. v. Bowkus, 109 Mich. 360, 67 N. W. 319; Newton v. S. (Miss.), 12 So. 560; P. v. Hertz, 105 Cal. 660, 39 Pac. 32; S. v. Wheeler, 79 Mo. 366; Underhill Cr. Ev. § 279. An instruction which assumes disputed facts as illustrations of the law, which does not state the facts hypothetically, is improper as being a charge on the evidence, Jones v. Charleston & W. C. R. Co. 61 S. Car. 556, 39 S. E. 758.

[22] Fullerton v. Fordyce, 121 Mo. 1, 25 S. W. 587.

that such injury has been established.[23] Also, the giving of an instruction which assumes that certain machinery is a part of the real estate on which it is located is improper, where the fact as to whether the machinery was or was not a fixture was in dispute.[24] Also, where the evidence shows that the defendant denies being indebted to the plaintiff it is error to instruct the jury that the defendant admits such indebtedness.[25]

§ **196. Instructions may assume facts—When.**—But where a material fact is conclusively shown by undisputed evidence, or is admitted to be true, then the giving of an instruction which assumes that such fact has been established is not error, and affords no ground for complaint on the giving of instructions.[26]

[23] Houston City St. R. Co. v. Artusey (Tex. Cv. App.), 31 S. W. 319.

[24] Mundine v. Pauls, 28 Tex. Cv. App. 46, 66 S. W. 254.

[25] Aliunde Consul Min. Co. v. Arnold (Colo. App.), 67 Pac. 28.

[26] Illinois Cent. R. Co. v. King, 179 Ill. 96, 53 N. E. 552; Gerke v. Fancher, 158 Ill. 385, 41 N. E. 982; Chicago C. R. Co. v. Carroll, 206 Ill. 318, 68 N. E. 1087; North C. St. R. Co. v. Honsinger, 175 Ill. 318, 51 N. E. 613; Chicago City R. Co. v. Allen, 169 Ill. 287, 48 N. E. 414; Williams v. P. 164 Ill. 482, 45 N. E. 987; Quinn v. P. 123 Ill. 343, 15 N. E. 46; Wallace v. De Young, 98 Ill. 638; Chicago Screw Co. v. Weiss, 203 Ill. 539, 68 N. E. 54; Citizens' Ins. Co. v. Stoddard, 197 Ill. 331, 64 N. E. 355; Cupps v. S. (Wis.), 97 N. W. 216; First Nat. Bank v. Bower (Neb.), 98 N. W. 836; Lee v. O'Quinn, 103 Ga. 355, 30 S. E. 356; S. v. Gorham, 67 Vt. 365, 31 Atl. 845; Terrell v. Russell, 16 Tex. Cv. App. 573, 42 S. W. 129; County of Cook v. Harms, 108 Ill. 151, 163; Hill v. S. 42 Neb. 503, 60 N. W. 916; St. Louis, J. & S. R. Co. v. Kirby, 104 Ill. 345, 349; Morgan v. S. 51 Neb. 672, 71 N. W. 788; Central Georgia R. Co. v. Johnston, 106 Ga. 130, 32 S. E. 78; Drennen v. Smith, 115 Ala. 396, 22 So. 442; North C. St. R. Co. v. Honsinger, 175 Ill. 318, 51 N. E. 613; San Antonio & A. P. R. Co. v. Griffin (Tex. Cv. App.), 48 S. W. 542; Ellis v. Stewart (Tex. Cv. App.), 24 S. W. 585; San Antonio & A P. R. Co. v. Wright, 20 Tex. 136, 49 S. W. 147; Truxton v. Dait Stayle Co. (Del.), 42 Atl. 431; Little v. Town of Iron River, 102 Wis. 250, 78 N. W. 416; Missouri, K. & T. R. Co. v. Warren, 19 Tex. Cv. App. 463, 49 S. W. 254; Spigner v. S. 103 Ala. 30, 15 So. 892; Brown v. Emerson, 66 Mo. App. 63; Burt v. Long, 106 Mich. 210, 64 N. W. 60. But see Byers v. Wallace, 88 Texas, 503, 28 So. 1056 (facts not conclusive); S. v. Drumm, 156 Mo. 216, 56 S. W. 1086; Whitney v. S. 154 Ind. 573, 57 N. E. 398; Tyler v. Tyler, 78 Mo. App. 240; Wilkerson v. S. (Tex. Cr. App.), 57 S. W. 956; Torres v. S. (Tex. Cr. App.), 55 S. W. 828; Barkley v. Barkley Cemetery Asso. 153 Mo. 300, 54 S. W. 482; Bertram v. Peoples R. Co. 154 Mo. 639, 55 S. W. 1040; Koener v. S. 98 Ind. 13; Marshall v. Morris, 16 Ga. 368, 376; Roberts v. Mansfield, 32 Ga. 228; Jeffries v. S. 61 Ark. 308, 32 S. W. 1080; S. v. Bone, 114 Iowa, 537, 87 N. W. 507; Board v. Legg, 110 Ind. 480, 11 N. E. 612; Wabash R. Co. v. Williamson, 104 Ind. 157, 3 N. E. 814; Smith v. S. 28 Ind. 321; Stephenson v. Wright, 111 Ala. 579, 20 So. 622; Wiborg v. U. S. 163 U. S. 632, 16 Sup. Ct. 1127; Louisville, E. & St. L. C. R. v. Utz, 133 Ind. 265, 32 N. E. 881; Holliday v. S. 35 Tex. Cr.

Thus an instruction which assumes that the plaintiff's leg was injured, is not material error where the fact of such injury was not disputed on the trial.[27] Or, in other words, where a fact is so conclusively proved by undisputed testimony that but one conclusion can be reached from the evidence the court may assume such fact as having been established.[28] And although a material fact may be disputed, yet if all the evidence can lead to no other conclusion than the truth of the fact, the court may, in giving instructions, assume such fact to be true.[29]

Where a fact is so clearly established by the evidence that the court would be warranted in giving a peremptory instruction on the subject, an instruction assuming such fact is not for that reason erroneous.[30]

App. 133, 32 S. W. 538. See also McGee v. Smitherman, 69 Ark. 632, 65 S. W. 461; Hall v. Incorporated Town, &c. 90 Iowa, 585, 58 N. W. 881, McLane v. Maurer, 28 Tex. Cv. App. 75, 66 S. W. 693; Gulf, C. & S. F. R. Co. v. Pierce, 7 Tex. Cv. App. 597, 25 S. W. 1052; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. 111; Byers v. Wallace (Tex. Cv. App.), 25 S. W. 1043; Reliance T. & D. Works v. Martin, 23 Ky. L. R. 1625, 65 S. W. 809; Gulf, C. & S. F. R. Co. v. Wilbanks, 7 Tex. Cv. App. 489, 27 S. W. 302; Welden v. Omaha, K. C. & E. R. Co. 93 Mo. App. 668, 67 S. W. 698; Citizens' Ins. Co. v. Stoddard, 197 Ill. 330, 64 N. E. 355; International & G. N. R. Co. v. Locke (Tex. Cv. App.), 67 S. W. 1082; S. v. Nickels, 65 S. Car. 169, 43 S. E. 521; Parks v. St. Louis & S. R. Co. (Mo.), 77 S. W. 70; McAyeal v. Gullett, 202 Ill. 214; Louisville & N. R. Co. v. Harrod, 25 Ky. L. R. 250, 75 S. W. 233.

[27] Chicago & A. R. Co. v. McDonnell, 194 Ill. 82, 62 N. E. 308. See Gran v. Houston, 45 Neb. 813, 64 N. W. 245; Taylor v. Scherpe & K. A. I. Co. 133 Mo. 349, 34 S. W. 581; Black v. Rocky Mountain B. T. Co. (Utah), 73 Pac. 514; McCullough v. Armstrong (Ga.), 45 S. E. 379; Thayer County Bank v. Huddleson (Neb.), 95 N. W. 471; Vogeler v. Devries (Md.), 56 Atl. 782.

[28] Wright v. Hardie, (Tex. Cv. App.), 30 S. W. 675; Hollings v. Bankers' Union, 63 S. Car. 192, 41 S. E. 90; Galveston, H. & S. A. R. Co. v. Jenkins, 29 Tex. Cv. App. 440, 69 S. W. 233; Gavigan v. Evans, 45 Mich. 597, 8 N. W. 545; First Nat. Bank v. Sargent (Neb.), 91 N. W. 595; Morgan v. S. (Tex. Cr. App.), 67 S. W. 420; Northwestern Fuel Co. v. Danielson, 57 Fed. 915; Texas &c. R. Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104; Muir v. Miller, 82 Iowa, 700, 47 N. W. 1011, 48 N. W. 1032; Douglass v. Geiler, 32 Kas. 499, 5 Pac. 178; McLellon v. Wheeler, 70 Me. 285; P. v. Lee Sare Bo, 72 Cal. 623, 14 Pac. 310; Hogan v. Shuart, 11 Mont. 498, 28 Pac. 736; Valentine v. Sweatt (Tex. Cv. App.), 78 S. W. 385; Dallas R. Tr. R. Co. v. Payne (Tex. Cv. App.), 78 S. W. 1085.

[29] Toole v. Bearce, 91 Me. 209, 39 Atl. 558; Ragan v. Kansas City, S. & E. R. Co. 144 Mo. 623, 46 S. W. 602; Halfman v. Pennsylvania Boiler Ins. Co. 160 Pa. St. 202, 28 Atl. 837; Cook County v. Harms, 108 Ill. 151; Chicago, St. L. & P. R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280.

[30] Thompson v. Brannin, 19 Ky. L. R. 454, 40 S. W. 914.

But the fact that the evidence on a material issue is all on one side does not authorize the court to direct the jury that it proves a controverted fact. Thus in an action against a railroad company for the value of stock killed by it, where the plaintiff was the only witness who testified as to the value of the stock killed, it was held improper for the court to direct the jury to find the value to be the amount testified to by the plaintiff. In such state of the case the jury are not bound to believe the plaintiff, though no evidence was introduced to contradict him.[31]

§ 197. **Facts admitted by both parties.**—Where a fact is admitted by both of the parties to the suit the court in charging the jury may in direct terms state that such fact is admitted.[32] But, of course, it is error to instruct that a material fact is admitted if there is no evidence of such admission.[33] Facts which are admitted by the pleadings or parties should not be submitted to the jury for determination as though in dispute.[34] And it has been held that where a fact is affirmed by one party in his pleadings and not denied by the other, the court may, in giving instructions, assume such fact to be true.[35]

§ 198. **Assuming facts in criminal cases.**—While it is the better practice for the court in charging the jury in a criminal case to avoid assuming any material fact as having been proved, however clear to the mind of the court such fact may seem to be established,[36] yet facts about which there is no dispute and

[31] Choctaw, O. & G. R. Co. v. Deperade (Okl.), 71 Pac. 629. See Foster v. Franklin L. Ins. Co. (Tex. Cv. App.), 72 S. W. 91; P. v. Webster, 111 Cal. 381, 43 Pac. 1114.

[32] Cooper v. Denver & R. G. R. Co. 11 Utah, 46, 39 Pac. 478; Stephens v. Porter, 29 Tex. Cv. App. 556, 69 S. W. 423; S. v. Angel, 29 N. Car. 27; Driver v. Board, &c. 70 Ark. 358, 68 S. W. 26; Blaul v. Tharp, 83 Iowa, 665, 49 N. W. 1044; S. v. Pritchard, 16 Nev. 101; San Antonio & A. R. Co. v. Iles (Tex. Cv. App.), 59 S. W. 564; Galveston, H. & S. A. R. Co. v. Lynes (Tex. Cv. App.), 65 S. W. 1119.

[33] Cocoran v. Lehigh Coal Co. 138 Ill. 399, 28 N. E. 759. The giving of an instruction assuming the existence of facts of common knowledge about which there is no controversy is not error, Harris v. Shebeck, 151 Ill. 287, 37 N. E. 1015.

[34] Miles v. Walker (Neb.), 92 N. W. 1014; Trager v. Shepherd (Miss.), 18 So. 122; Orth v. Clutz's Adm'r, 18 B. Mon. (Ky.), 223; Wiley v. Man-a-to-wah, 6 Kas. 111; Stewart v. Nelson, 79 Mo. 522; Com. v. Ruddle, 142 Pa. St. 144, 21 Atl. 814; Bellefontaine R. Co. v. Snyder, 24 Ohio St. 670; Wintz v. Morrison, 17 Tex. 387; Druse v. Wheeler, 26 Mich. 189.

[35] Bussey v. Charleston & W. C. R. Co. 52 S. Car. 438, 30 S. E. 477; Riser v. Southern R. Co. (S. Car.), 46 S. E. 51.

[36] Hughes Cr. Law, § 3250, citing:

concerning which no issue is made, may properly be called to the attention of the jury in the giving of instructions.[37] Thus in a homicide case, where the fact that the defendant, and no one else, fired the fatal shot is admitted, an instruction assuming that the shooting took place is not objectionable;[38] or an instruction assuming the fact of the killing is not prejudicial error where there is no dispute that the killing was done by the defendant.[39] But where the fact of the killing is controverted then an instruction assuming such fact is prejudicial error.[40]

P. v. Dick, 32 Cal. 216; S. v. Whitney, 7 Ore. 386; S. v. Mackey, 12 Ore. 154, 6 Pac. 648, 5 Am. Cr. R. 536.

[37] S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. Cr. R. 219; Davis v. P. 114 Ill. 86, 29 N. E. 192; Williams v. P. 164 Ill. 483, 45 N. E. 987; Holliday v. S. 35 Tex. Cr. App. 133, 32 S. W. 538; S. v. Gorham, 67 Vt. 365, 31 Atl. 845, 10 Am. Cr. R. 28; S. v. Day, 79 Me. 120, 8 Atl. 544; P. v. Sternberg, 111 Cal. 3, 43 Pac. 198; S. v. Horne, 9 Kas. 119, 1 Green Cr. R. 722; S. v. Aughtry, 49 S. Car. 285, 26 S. E. 619, 27 S. E. 199; Hawkins v. S. 136 Ind. 630, 36 N. E. 419; Underhill Cr. Ev. § 277; Bertram v. Peoples R. Co. 154 Mo. 639, 55 S. W. 1040.

[38] Whitney v. S. 154 Ind. 573, 57 N. E. 398; S. v. Holloway, 156 Mo. 222, 56 S. W. 734; Hanrohan v. P. 91 Ill. 142; Genz v. S. 58 N. J. L. 482, 34 Atl. 816. The court may charge that the killing is conceded.

[39] P. v. Pullman, 129 Cal. 258, 61 Pac. 961; S. v. Holloway, 156 Mo. 222, 56 S. W. 734; Davis v. P. 114 Ill. 97, 29 N. E. 192; Weller v. S. 19 Ohio C. C. 166. See S. v. Medlin, 126 N. Car. 1127, 36 S. E. 344.

[40] Cannon v. P. 141 Ill. 270, 282, 30 N. E. 1027; Weller v. S. 19 Ohio C. C. 166; Reins v. P. 30 Ill. 256, 274; S. v. Marsh, 171 Mo. 523, 71 S. W. 1003 (defendant denied being present); Gee v. S. 80 Miss. 285, 31 So. 792. Instructions held assuming facts: Barr v. P. 113 Ill. 471, 473; S. v. Reed, 50 La. Ann. 990, 24 So. 131; Hayes v. Pennsylvania R. Co. 195 Pa. St. 184, 45 Atl. 925; Dart v. Hom, 20 Ill. 213; P. v. Dom Pedro, 43 N. Y. S. 44, 19 Misc. 300; S. v. Bowker, 26 Ore. 309, 38 Pac. 124; Frank v. Tatum (Tex. Cv. App.), 26 S. W. 900; Dallas & O. C. R. Co. v. Harvey (Tex. Cv. App.), 27 S. W. 423; Richmond & D. R. Co. v. Greenwood, 99 Ala. 501, 14 So. 495; Landman v. Glover (Tex. Cv. App.), 25 S. W. 994; Ohlweiler v. Lohman, 88 Wis. 75, 59 N. W. 678; La Salle County C. Coal Co. v. Eastman, 99 Ill. App. 495; Mobile & O. R. Co. v. Healy, 100 Ill. App. 586; Bonaparte v. Thayer, 95 Md. 548, 52 Atl. 496; St. Louis S. W. R. Co. v. Silbey (Tex. Cv. App.), 68 S. W. 516; Hall v. S. 130 Ala. 45, 30 So. 422; Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073; Lake S. & M. S. R. Co. v. Brown, 123 Ill. 184, 14 N. E. 197; City of Elgin v. Beckwith, 119 Ill. 367, 10 N. E. 558; Commercial Nat. Bank v. Proctor, 98 Ill. 562. Instructions held not assuming facts in the following cases: Bartlett v. Board of Education, 59 Ill. 364, 373; Western M. M. Ins. Co. v. Boughton, 136 Ill. 317, 320, 26 N. E. 591; Lake Shore & M. S. R. Co. v. Johnson, 135 Ill. 641, 652, 26 N. E. 510; Chicago & N. W. R. Co. v. Goebel, 119 Ill. 515, 521, 10 N. E. 369; Chicago, St. L. & P. R. Co. v. Welsh, 118 Ill. 572, 575, 9 N. E. 197; Roark v. S. 105 Ga. 736, 32 S. E. 125; Bird v. Forceman, 62 Ill. 212, 215; Nugent v. Brenchard, 157 N. Y. 687, 51 N. E. 1092; Freeman v. Cates, 22 Tex. Cv. App. 623, 55 S. W. 524; Dammann v. City of St. Louis, 152 Mo. 186, 53 S. W. 932; Triolo v. Foster (Tex. Cv. App.), 57 S. W. 698; International G. & N. R. Co. v. Martineg (Tex. Cv. App.), 57 S.

And this is true in all jurisdictions, and is a well settled principle.

W. 689; Sherman, S. & S. R. Co. v. Bell (Tex. Cv. App.), 58 S. W. 147; Ryder v. Jacobs, 196 Pa. St. 386, 46 Atl. 667; Jackson v. Burnham, 20 Colo. 532, 39 Pac. 577; Robinson v. S. (Miss.), 16 So. 201; P. v. Mallon, 103 Cal. 513, 37 Pac. 512; Hans v. S. 50 Neb. 150, 69 N. W. 838; S. v. Straub, 16 Wash. 111, 47 Pac. 227; Welsh v. S. 60 Neb. 101, 82 N. W. 368; Conners v. S. 95 Wis. 77, 69 N. W. 981; Galveston, H. & S. A. R. Co. v. Buch, 27 Tex. Cv. App. 283, 65 S. W. 681; Throckmorten v. Missouri, K. & T. R. Co. 14 Tex. Cv. App. 222, 39 S. W. 174; Texas & O. R. Co. v. Echols, 17 Tex. Cv. App. 677, 41 S. W. 488; Geary v. Kansas City, O. & S. R. Co. 138 Mo. 257, 39 S. W. 774; Sonnefield v. Mayton (Tex. Cv. App.), 39 S. W. 166; Missouri, K. & T. R. Co. v. Hines (Tex. Cv. App.), 40 S. W. 152; Texas & N. O. R. Co. v. Echols, 17 Tex. Cv. App. 677, 41 S. W. 488; Rapid Tr. R. Co. v. Lusk (Tex. Cv. App.), 66 S. W. 799; Wreggitt v. Barnett, 99 Mich. 477, 58 N. W. 467; Illinois Cent. R. Co. v. Turner, 194 Ill. 575, 62 N. E. 798; Crockett v. Miller, 112 Fed. 729; Norfolk & W. R. Co. v. Poole's Adm'r, 100 Va. 148, 40 S. E. 627; Louisville & N. R. Co. v. Ward, 61 Fed. 927; Moore v. S. 114 Ga. 256, 40 S. E. 295; Williams v. S. (Tex. Cr App.), 65 S. W. 1059; Tunnicliffe v. Fox (Neb.), 94 N. W. 1032; P. v. Lapique (Cal.), 67 Pac. 14; Lyon v. Watson, 109 Mich. 390, 67 N. W. 512; Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273; Nugent v. Breuchard, 36 N. Y. S. 102, 91 Hun, 12; Comey v. Philadelphia Tr. Co. 175 Pa. St. 133, 34 Atl. 621; Galveston, H. & S. A. R. Co. v. Waldo (Tex. Cv. App.), 32 S. W. 783; Richmond v. Traction Co. (Va.), 43 S. E. 622.

CHAPTER VIII.

BURDEN OF PROOF.

Sec.
199. Instructions that burden is on affirmant.
200. Degree of proof by preponderance.
201. Burden and degree of proof in criminal cases.
202. Instructions when evidence is equally balanced.
203. Preponderance — How determined—Witnesses.

§ 199. Instruction that burden is on affirmant.—The party who, by his pleading, alleges a fact or state of facts is required to prove the same by a preponderance of the evidence, and the court, on proper request, should so instruct the jury. Thus the plaintiff is on the affirmative as to the facts alleged in his complaint or declaration, and the court should instruct the jury that the burden is on him to make out his case by a preponderance of the evidence.[1] And in some cases at least it is not improper to instruct that the plaintiff must prove all the material facts of his complaint by a preponderance of the evidence.[2] But where the plaintiff's petition or declaration alleges

[1] Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Central R. Co. v. Barmister, 195 Ill. 50, 62 N. E. 864; De Hart v. Bond, 143 Ind. 363, 41 N. E. 825; Williams v. Hoehle, 95 Wis. 510, 70 N. W. 556; Flores v. Maverick (Tex. Cv. App.), 26 S. W. 316; Meyer v. Blackmore, 54 Miss. 575; Fowler v. Harrison, 64 S. Car. 311, 42 S. E. 159; Guimard v. Knapp, Stout & Co. 95 Wis. 482, 70 N. W. 671. See Jesse French Piano & Organ Co. v. Forbes, 134 Ala. 302, 32 So. 678 (excluding uncertainty).

[2] Salem Stone, &c. Co. v. Griffin, 139 Ind. 141, 38 N. E. 411; De Hart v. Board, 143 Ind. 363, 41 N. E. 825. In a personal injury case the burden of proof does not shift to the defendant on proof of the injury. The plaintiff must prove not only the injury, but also that it was caused by the negligence of the defendant, Peck v. St. Louis Tr. Co. (Mo.), 77 S. W. 736.

several material facts, the proof of any one of which would make out his case (for instance, several different grounds of negligence), then such an instruction would be improper. Only so many of the material facts as are necessary to constitute a cause of action need be established.[3]

Where the pleadings put several facts in issue, the proof of any one of which would entitle a party to a verdict, an instruction calling for proof of all of such facts conjunctively is erroneous.[4] But submitting several matters conjunctively, instead of disjunctively and severally, cannot be complained of as error in the absence of a request for a proper instruction.[5] So where the defendant, by his pleading, sets up affirmative matter in his plea or answer, the plaintiff is entitled to have the jury instructed that the burden is on the defendant to establish the facts thus alleged, by a preponderance of the evidence.[6] And although there may be no conflict of testimony as to a material fact, it is not error to charge the jury that the party alleging such fact must prove it by a preponderance of the evidence.[7]

But the party upon whom rests the burden of proving a material fact in issue is not confined to evidence introduced on his side of the case. He may rely upon any evidence of his opponent to aid him. It matters not whether the evidence is given by the one party or the other; it is sufficient if the fact is proved by a preponderance of the evidence.[8] Hence, to instruct the jury that the burden of proving contributory negligence on the part of the plaintiff rests on the defendant, is improper.[9] The court may, however, properly refuse instructions on the burden of proof where the evidence introduced by a party is

[3] Houston & T. C. R. Co v. Patterson (Tex. Cv. App.), 57 S. W. 675.

[4] Bell v. Beazley, 18 Tex. Cv. App. 639, 45 S. W. 401; Gulf, C. & S. F. R. Co. v. Hill, 95 Tex. 629, 69 S. W. 136; Wilson v. Huguenin, 117 Ga. 546, 43 S. E. 857; Herbert v. Drew, 32 Ind. 366.

[5] Gulf, C. & S. F. R. Co. v. Hill, 95 Tex. 629, 69 S. W. 136.

[6] Whipple v. Preece, 18 Utah, 454, 56 Pac. 296; Kuenster v. Woodhouse, 101 Wis. 216, 77 N. W. 165; Nichol v. Laumeister, 102 Cal. 658, 36 Pac. 925; Kepler v. Jessup, 11 Ind. 241.

[7] Blotcky v. Caplan, 91 Iowa, 352, 59 N. W. 204. See Chittim v. Martinez, 94 Tex. 141, 58 S. W. 948. See Indianapolis & G. R. Tr. Co. v. Haines (Ind.), 69 N. E. 188.

[8] Indianapolis & G. R. T. Co. v. Haines (Ind.), 69 N. E. 188; Chicago & E. I. R. Co. v. Stephenson (Ind.), 69 N. E. 273.

[9] Indianapolis & G. R. T. Co. v. Haines (Ind.), 69 N. E. 188.

uncontradicted.[10] Or where a fact is conclusively established by the evidence the court may properly refuse to instruct on the burden of proof.[11] Also the refusal to charge the jury on which party the burden of proof originally rested is not error where the evidence conclusively establishes the fact in issue.[12]

But when a party is entitled to have the jury instructed on the law as to the burden of proof, and makes proper request therefor, it is error for the court to refuse such instructions.[13] However, a party will not be heard to complain of the failure of the court to instruct the jury on the burden of proof in the absence of a proper request in that respect.[14] It is also error for the court in charging the jury to place the burden of proof on the wrong party.[15] But if a party assumes the burden of an issue, which, by the pleadings, is on the other party, he cannot complain of error in that respect.[16]

Where the court errs in charging that the burden of proof is on the defendant, and it appears that the plaintiff successfully carried the burden by his proof, the error is not material.[17] While it is not necessary that the court, in charging the jury on the burden of proof, should define preponderance of evidence,[18] yet when the court undertakes to do so the instruction defining the term should be proper and applicable to the

[10] Milmo Nat. Bank v. Convery (Tex. Cv. App.), 49 S. W. 926; Davis v. Davis, 20 Tex. Cv. App. 310, 49 S. W. 726.

[11] Yetter v. Zurick, 55 Minn. 452, 57 N. W. 147.

[13] Black v. S. 1 Tex. App. 369; Stevens v. Pendleton, 94 Mich. 405, 53 N. W. 1108.

[14] Miles v. Strong, 68 Conn. 273, 36 Atl. 55; Donavan v. Bromley, 113 Mich. 53, 71 N. W. 523; Anderson v. Baird, 19 Ky. L. R. 444, 40 S. W. 923; Lamma v. S. 46 Neb. 236, 64 N. W. 956. The court is not bound to instruct on its own motion: Maynard v. Fellows, 43 N. H. 255; Gulf, C. & S. F. R. Co. v. McCarty, 82 Tex. 608, 18 S. W. 716; McKinney v. Guhman, 38 Mo. App. 344; Duncombe v. Powers, 75 Iowa, 185, 39 N. W. 261; Conway v. Jefferson, 46 N. H. 521; In re Bromley's Estate, 113 Mich. 53, 71 N. W. 523; Martin v. Davis, 76 Iowa, 762, 40 N. W. 712.

[15] Wildey v. Crane, 69 Mich. 17, 36 N. W. 734; S. v. Crossley, 69 Ind. 203; S. v. Grinstead, 62 Kas. 593, 64 Pac. 49; McNutt & R. v. Kaufman, 26 Ohio St. 130. In such case the court will not look to the evidence to see whether it sustains the verdict returned, Chicago & A. R. Co. v. Murphy, 198 Ill. 470, 64 N. E. 1011.

[16] Armstrong v. Penn, 105 Ga. 229, 31 S. E. 158. See Freemont, E. & M. V. R. Co. v. Harlin, 50 Neb. 698, 70 N. W. 263, 36 L. R. A. 417.

[17] Moore v. Brewer, 94 Ga. 260, 21 S. E. 460.

[18] Jones v. Durham, 94 Mo. App. 51, 67 S. W. 976; Endowment Rank K. P. v. Steele, 108 Tenn. 624, 69 S. W. 336.

evidence before the jury. It is improper to say that preponderance means the greater weight of evidence, to be determined from a careful examination of all the evidence "tendered" where there was testimony offered but not admitted.[19]

§ 200. **Degree of proof by preponderance.**—As stated in the preceding section, the party upon whom the burden rests is required to establish his facts by a preponderance of the evidence. Hence an instruction in a civil case, which calls for proof by a greater weight of evidence than by a preponderance, is erroneous.[20] Thus an instruction exacting proof by a "clear preponderance,"[21] or by a "fair preponderance,"[22] or by "more and better evidence" than that of the opposing party, is improper, in that it calls for a higher degree of proof than a preponderance of the evidence.[23] Also a charge telling the jury that the evidence should "satisfy" their minds to warrant a verdict,[24] or an instruction requiring proof to the "satisfaction" of the jury,[25] or that the evidence must "conclusively"

[19] Hurlbut v. Bagley, 99 Iowa, 127, 68 N. W. 585; Western U. Tel. Co. v. James (Tex. Cv. App.), 73 S. W. 79.

[20] White v. Ferris, 124 Ala. 461, 27 So. 259; Roe v. Bachelder, 41 Wis. 360; McCord-Brady Co. v. Moneyhan, 59 Neb. 593, 81 N. W. 608; Long v. Martin, 152 Mo. 668, 54 S. W. 473; Lundon v. City of Chicago, 83 Ill. App. 208; Coffin v. U. S. 156 U. S. 432, 15 Sup. Ct. 394. Contra: S. v. Linhoff (Iowa), 97 N. W. 77. See Kirchner v. Collins, 152 Mo. 394, 53 S. W. 1081; Herrick v. Gary, 83 Ill. 85; Guardian Mutual Life Ins. Co. v. Hogan, 80 Ill. 35, 41.

[21] Douley v. Dougherty, 75 Ill. App. 379; Bitter v. Saathoff, 98 Ill. 266; Prather v. Wilkins, 68 Tex. 187, 4 S. W. 252; Hall v. Wolff, 61 Iowa, 559, 16 N. 710 (clearly and fairly); Meyer v. Hafemeister, (Wis.), 97 N. W. 166.

[22] Atkinson v. Reed (Tex. Cv. App.), 49 S. W. 260; Houston & T. C. R. Co. v. Dotson, 15 Tex. Cv. App. 73, 38 S. W. 642; Ashbome v. Town of W. 69 Conn. 217, 37 Atl. 498; Effinger v. S. 9 Ohio C. C. 376; B. Langtry Sons v. Lowrie (Tex. Cv. App.), 58 S. W. 835; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404; Hart v. Niagara Fire Ins. Co. 9 Wash. 620, 38 Pac. 213; Altschuler v. Coburn, 38 Neb. 881, 57 N. W. 836.

Contra: Meyer v. Hafemeister (Wis.), 97 N. W. 166.

[23] Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 163, 62 N. E. 831; Rolfe v. Rich, 149 Ill. 436, 35 N. E. 352 (satisfactory evidence); Graves v. Cadwell, 90 Ill. 612, 615.

[24] Moor v. Heineke, 119 Ala. 627, 24 So. 374; Town of Havana v. Biggs, 58 Ill. 483, 486; Willis v. Chowning, 90 Tex. 617, 40 S. W. 395; Texas, &c. R. Co. v. Ballinger (Tex. Cv. App.), 40 S. W. 822; Wollf v. Van Housen, 55 Ill. App. 295; Finks v. Cox (Tex. Cv. App.), 30 S. W. 512; Frick v. Kabaker, 116 Iowa, 494, 90 N. W. 498; Brown v. Master, 104 Ala. 451, 16 So. 443. See Sams A. C. Co. v. League, 25 Colo. 129, 54 Pac. 642.

[25] Wolf v. Van Housen, 55 Ill. App. 295; Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; McBride v. Banguss, 65 Tex. 174, 467; Gregg

prove a fact or case, calls for too high a degree of proof.[26] So also it is improper to instruct that a party must prove his claim with "clearness and certainty."[27] But it has been held that an instruction stating that "the minds of the jury should be satisfied to a reasonable degree of certainty" is not material error.[28]

In South Carolina it has been held that a charge that the jury "must be sure" that the plaintiff was guilty of contributory negligence before they can find for the defendant is not erroneous and does not call for too high a degree of proof.[29]

But where fraud is alleged and made an issue, especially where the charge is such as, if true, it indicates criminal conduct, the evidence must establish the charge by a clear preponderance.[30]

The refusal of an instruction calling for the "clearest and most satisfactory evidence" of the existence of the relation of debtor and creditor between husband and wife at the time of the transfer of property from one to the other has been held not to be error in the absence of an explanation of what is meant by the expression "clearest and most satisfactory evidence."[31]

In a will contest a charge which states that "undue influence need not be proved by direct evidence, but may be shown by facts and circumstances which lead the mind to the conviction that

v. Jones (Tex. Cv. App.), 26 S. E. 132; Feist v. Boothe (Tex. Cv. App.), 27 S. W. 33; Lowery v. Rowland, 104 Ala. 420, 16 So. 88; Miller v. Barber, 66 N. Y. 558; Monaghan v. Agriculture F. Ins. Co. 53 Mich. 238; Pierpont Mfg. Co. v. Goodman Produce Co. (Tex. Cv. App.), 60 S. W. 347. Contra: Surber v. Mayfield, 156 Ind. 375, 60 N. E. 7; Carstens v. Earles, 26 Wash. 676, 67 Pac. 404.

[26] Greathouse v. Moore (Tex. Cv. App.) 23 S. W. 226; Gage v. Louisville, N. O. & T. R. Co. 88 Tenn. 724, 14 S. W. 73.

[27] Maxon v. Farris (Tex. Cv. App.), 48 S. W. 741; F. Dohmen Co. v. Niagara Fire Ins. Co. 96 Wis. 38, 71 N. W. 69; McLeod v. Sharp, 53 Ill. App. 406; Brown v. Master, 104 Ala. 451, 16 So. 443; U. S. Fidelity & G. Co. v. Charles, 131 Ala. 657, 31 So. 558, 57 L. R. A. 212; Palm v. Chernowsky, 28 Tex. Cv. App. 405, 67 S. W. 165.

[28] Liverpool & L. & G. Ins. Co. v. Farnsworth Lumber Co. 72 Miss. 555, 17 So. 445; Peltier v. Chicago, St. P. M. & O. R. Co. 88 Wis. 521, 60 N. W. 250. Contra: Lowery v. Rowland, 104 Ala. 420, 16 So. 88; O'Neil v. Blase, 94 Mo. App. 648, 68 S. W. 764.

[29] Bodie v. Charleston, N. C. R. Co. 61 S. Car. 468, 39 S. E. 715.

[30] Klipstein v. Raschein, 117 Wis. 248, 94 N. W. 63; Poertner v. Poertner, 66 Wis. 644, 29 N. W. 386. See Wallace v. Maltice, 118 Ind. 59, 20 N. E. 706; Stevens v. Stevens, 127 Ind. 560, 26 N. E. 1078. Palm v. Chernowsky, 28 Tex. Cv. App. 405, 67 S. W. 165; Stocks v. Scott, 188 Ill. 266, 58 N. E. 990.

[31] Hartman & F. B. Co. v. Clark, 94 Md. 520, 51 Atl. 291.

it has been exercised," is not rendered obnoxious by the use of the word "conviction," where other instructions in the charge state that the burden is on the contestants to establish want of mental capacity and undue influence by a preponderance of the credible testimony, which means by the greater weight of the testimony.[32]

§ 201. Burden and degree of proof in criminal cases.—As stated in another chapter, the burden is on the prosecution to prove the guilt of the accused beyond a reasonable doubt, as charged in the indictment; and each of the essential elements necessary to constitute the offense charged must be established to the same degree of certainty before a conviction is warranted, and a refusal to so instruct the jury is error.[33] In some jurisdictions the burden is on the accused, in a criminal case, to establish his affirmative defense, such as insanity and self-defense by a preponderance of the evidence, and in others he is only required to raise a reasonable doubt of his guilt from all of the evidence on both sides considered together. In either case an instruction requiring him to establish his defense beyond a reasonable doubt is erroneous, in that it calls for too high a degree of proof;[34] but, of course, such instruction is proper in those states where the law requires the accused to establish his defense beyond a reasonable doubt.[35]

In those states where the burden is on the defendant to raise only a reasonable doubt of his guilt the giving of an instruction stating that the defendant is required to make "satisfactory"

[32] Goldthorp v. Goldthorp, 115 Iowa, 430, 88 N. W. 944.

The improper use of the words "burden of proof" for "preponderance of evidence" is not material error where the court properly states that the burden is on the plaintiff to make out his case by a preponderance of the evidence: Williams v. Hoehle, 95 Wis. 510, 70 N. W. 556; Flores v. Maverick (Tex. Cv. App.), 26 S. W. 316; Doran v. Cedar Rapids & M. C. R. Co. 117 Iowa, 442, 90 N. W. 815 ("testimony" for "evidence").

[33] See "Reasonable Doubt," § 150.

On a charge of perjury an instruction calling for proof equivalent to two witnesses is erroneous, in that it requires too high a degree of proof, S. v. Courtright, 66 Ohio St. 37, 63 N. E. 590.

[34] Hamilton v. S. 97 Tenn. 452, 37 S. W. 194; McKnight v. U. S. 115 Fed. 972 (intent); German v. U. S. 120 Fed. 666 (insanity by preponderance is error); Landers v. S. (Tex. Cr. App.), 63 S. W. 557; S. v. Porter, 64 Iowa, 237, 20 N. W. 168 (preponderance); Clark v. S. 159 Ind. 60, 64 N. E. 589 (self-defense).

[35] Com. v. Kilpatrick, 204 Pa. St. 218, 53 Atl. 774; S. v. Lewis, 20 Nev. 333, 22 Pac. 241, 8 Am. Cr. R. 592; S. v. Scott, 49 La. R. 253, 21 So. 271, 10 Am. Cr. R. 591; Hughes Cr. Law, § 2434.

proof of his defense or mitigation, unless such proof "satisfactorily" arises out of the evidence for the prosecution is error in exacting a higher degree of proof than the law requires.[36] Thus an instruction in a homicide case requiring the accused to prove self-defense to the "satisfaction" of the jury is erroneous, in that it calls for too high a degree of proof. The accused is only required to raise a reasonable doubt by his defense.[37] And it is also error, where the plea is self-defense, to charge that before the jury can acquit they must be reasonably satisfied that the defendant killed the deceased under an immediate sense of great danger of losing his life or suffering serious bodily harm, in that it takes from the state the burden of proof.[38] So in a larceny case an instruction requiring the defendant to satisfactorily explain his possession of property alleged to have been stolen, for the same reason, is erroneous.[39] It is error for the court to charge that the threatened danger to the person must be so great as to create a reasonable belief in the mind of the person assaulted, of imminent peril to life or "the most serious bodily harm." The words of the statute being "great bodily harm" fall far short of "most serious bodily harm;" the one may endanger life, the other not.[40]

§ 202. Instructions when evidence is equally balanced.—If the evidence is equally balanced, or so close as to make it doubtful which party has presented the greater weight of evidence, then the verdict should be against the party on whom rests the burden of proof, and the refusal to give an instruction to that effect when properly requested is error.[41] But the giving of such an instruction under some state of facts may be

[36] Smith v. P. 142 Ill. 122, 31 N. E. 599; Clark v. S. 159 Ind. 65, 64 N. E. 589; Boykin v. P. 22 Colo. 496, 45 Pac. 419; S. v. McKea, 120 N. Car. 608, 27 S. E. 78.

[37] Wacaser v. P. 134 Ill. 438, 442; Alexander v. P. 96 Ill. 102. See Dorsey v. S. 110 Ga. 331, 35 S. E. 651; Jackson v. P. 18 Ill. 270; Hoge v. P. 117 Ill. 44, 6 N. E. 796. See "Homicide," "Reasonable Doubt."

[38] Dent v. S. (Ala.), 17 So. 94; P. v. Caasata, 39 N. Y. S. 641, 6 App. Div. 386, the burden never shifts in a criminal case.

[39] S. v. McKea, 120 N. Car. 608, 27 S. E. 78. See S. v. Garvin (S. Car.), 26 S. E. 570.

[40] Reins v. P. 30 Ill. 256, 275.

[41] City of Streeter v. Leibendorfer, 71 Ill. App. 625; City Banks Appeal from Com'rs, 54 Conn. 273, 7 Atl. 548; Bridenthal v. Davidson, 61 Ill. 461; Jones v. Angell, 95 Ind. 376. See Harper v. S. 101 Ind. 109; Jarrell v. Lillie, 40 Ala. 271.

improper. Thus, where the defendant, by his pleading, raises affirmative issues, such, for instance, as accord and satisfaction, of fraudulent representations and of failure of consideration, the burden is upon him, and not upon the plaintiff, to prove such issues. An instruction, therefore, which, in substance, tells the jury that the plaintiff is bound to make out his case by a preponderance of the evidence upon every material point, and in weighing the evidence if the jury think that it is evenly balanced upon any point necessary to a recovery by the plaintiff, or preponderates ever so slightly in favor of the defendant, they should find for the defendant, is improper, in that it throws on the plaintiff the burden of proving all the issues, including those raised by the defendant.[42]

§ 203. **Preponderance — How determined—Witnesses.** — The court is authorized to instruct the jury on the mode of determining the preponderance of the evidence, and should not refuse to do so, especially where the testimony is conflicting.[43] By a preponderance of the evidence is meant the greater weight of the evidence.[44] The preponderance of the evidence is not necessarily determined by the number of witnesses who may testify for or against a party, or on any point or issue involved.[45] The quality of the testimony, as well as the number of witnesses, must be considered by the jury in determining the preponderance.[46]

It is for the jury to say from all the evidence before them whether the testimony of the greater number of witnesses testifying shall be more or less controlling than the better quality of the testimony of the fewer number of witnesses.[47] It is improper therefore for the court to charge that the preponderance of the evidence is determined by the number of witnesses

[42] Richelieu Hotel Co. v. International M. E. Co. 140 Ill. 267, 29 N. E. 1044.

[43] Louisville & M. R. Co. v. Ward, 67 Fed. 927. See Buck v. Hogeboom (Neb.), 90 N. W. 635; Miller v. John, 208 Ill. 180.

[44] Ewen v. Wilbor, 208 Ill. 500.

[45] Wastl v. Montana N. R. Co. 17 Mont. 216, 42 Pac. 772; Bierbach v. Goodyear R. Co. 54 Wis. 213, 11 N. W. 514; Illinois Cent. R. Co. v. Zang, 10 Ill. App. 594; Howlett v. Dilts, 4 Ind. App. 23, 30 N. E. 313; West C. St. R. Co. v. Lieserowitz, 197 Ill. 612, 64 N. E. 718; Georgia N. R. Co. v. Hutchins (Ga.), 46 S. E. 662.

[46] Diver v. Hall, 46 N. Y. S. 533, 20 Misc. 677; S. v. Bohan, 19 Kas. 35. See, also, Hardy v. Milwaukee St. R. Co. 89 Wis. 183, 61 N. W. 771; Gilmore v. Seattle & R. R. Co. 29 Wash. 150, 69 Pac. 743; Dallas Cotton Mills v. Ashley (Tex. Cv. App.), 63 S. W. 160.

[47] Gilmore v. Seattle &c. R. Co. 29 Wash. 150, 69 Pac. 743.

on each side where the opposing witnesses are equally credible and equally well corroborated and have no greater interest in the result of the trial.[48] And for the same reason it is improper for the court to say to the jury that if they should find that three witnesses are of equal credibility and weight, and that the testimony of two of them conflict with the other, they may disregard the testimony of the latter; such instruction invades the province of the jury.[49] But to state that other things being equal the greater number of witnesses would carry the greater weight has been held to be proper.[50] So, a charge stating that "a case might arise in which a jury would be justified in finding a verdict for the defendant on the testimony of one witness against the testimony of any greater number of witnesses" is not improper.[51] Also a charge stating that the preponderance of the evidence is not alone to be determined by the entire number of witnesses, but also by their means of knowledge, conduct and demeanor in testifying, their interest or lack of interest, if any, in the suit, the probability or improbability of their statements, and the facts and circumstances shown on the trial which might go to determine the weight of their testimony, is proper.[52] An instruction which charges that the plaintiff must prove his case by a preponderance of the evidence, and that the jury should dispassionately weigh all the evidence, giving weight to the several witnesses as their character, intelligence, manner and testimony warrant, and to try to reconcile all statements so that all may appear to have told the truth, is equivalent to stating that preponderance does not consist in the greater numerical array of witnesses.[53]

[48] Christman v. Ray, 42 Ill. App. 111.

[49] Childs v. S. 76 Ala. 93; Amis v. Cameron, 55 Ga. 449; Johnson v. P. 140 Ill. 350, 29 N. E. 895; Armstrong v. S. 83 Ala. 49, 3 So. 431; Kelley v. Louisville & N. R. Co. 49 Ill. App 304; Kuehn v. Wilson, 13 Wis. 117.

[50] Spensley v. Lancashire Ins. Co. 62 Wis. 453, 22 N. W. 740. See Bisewski v. Booth, 100 Wis. 383, 76 N. W. 349.

[51] P. v. Chun Heong, 86 Cal. 329, 24 Pac. 1021.

[52] Buck v. Hogeboom (Neb.), 90 N. W. 635; Pfaffenback v. Lake S. & M. S. R. Co. 142 Ind. 246, 41 N. E. 530; Meyer v. Mead, 83 Ill. App. 19; Hays v. Johnson, 92 Ill. App. 80; West C. St. R. Co. v. Lieserowitz, 197 Ill. 612, 64 N. E. 718.

[53] Wilcox v. Hines, 100 Tenn. 524, 45 S. W. 781; see Ragsdale v. Ezell, 18 Ky. L. R. 146, 35 S. W. 629.

CHAPTER IX.

AFFIRMATIVE AND NEGATIVE EVIDENCE.

Sec.
204. Instructions on relative weight improper.
205. Instructions on relative weight proper.

§ 204. Instructions on relative weight improper.—Whether the affirmative testimony of a witness may be regarded as stronger than the negative testimony of another witness is a question for the jury to determine. The court cannot instruct them, as a matter of law, that the former is stronger than the latter without invading the province of the jury.[1] According to this principle, a charge stating that the fact that a person who is in a position to hear a bell ring, does not hear it, is no evidence that the bell did not ring, is improper (though relating to negative testimony), as touching on the weight of the evidence.[2] So to instruct that positive testimony of witnesses that a whistle was blown and bell rung is entitled to more weight than testimony of others that they did not hear the one or the other is improper, in the absence of an instruction on the credibility of the witnesses.[3] Also a charge "that affirmative evidence of the ringing of the bell and blowing of the whistle is generally entitled to more weight than evidence

[1] Rockwood v. Poundstone, 38 Ill. 200; Louisville, N. A. & C. R. Co. v. Shires, 108 Ill. 617, 632; Sparks v. Dawson, 47 Tex. 138. See Chicago & A. R. Co. v. Robinson, 106 Ill. 142; Chicago & A. R. Co. v. Pelligreen, 65 Ill. App. 333; Keith v. S. 49 Kas. 439; Sumpter v. S. (Fla.), 33 So. 981; Ohio & M. R. Co. v. Buck, 130 Ind. 300, 30 N. E. 19.

[2] Louisville & N. R. Co. v. York, 128 Ala. 305, 30 So. 676.

[3] Delaware, L. & W. R. Co. v. Devore, 114 Fed. 155; Southern R. Co. v. Bryan, 115 Ga. 659, 42 S. E. 43.

that it was not heard or noticed'' is improper as on the weight of the evidence.[4]

§ 205. **Instructions on relative weight proper.**—But in some jurisdictions the court should instruct the jury as to the relative weight of positive and negative evidence when requested to do so, if there is evidence on which to base the instruction.[5] Hence, according to this rule, a charge that it is for the jury to consider how much testimony of a negative character is worth, compared with positive testimony, and that ordinarily the evidence of a witness who swears positively that he saw a certain thing, is more valuable than that of witnesses who say they did not see it, is proper.[6] The giving of an instruction that positive testimony is generally to be believed in preference to negative testimony, other things being equal, and the witnesses being of equal credibility, is not improper.[7] So it is also proper for the court to charge that a witness who states to the best of his recollection that a certain fact is true, testifies less positively than one who positively states that such fact is true.[8]

An instruction stating that where witnesses testify that certain facts took place and other witnesses of equal credibility, having equal means of knowledge, testify that such facts did not take place, the testimony of the latter is not negative, but should be regarded by the jury as affirmative testimony, in which case the jury should weigh all the testimony and give a verdict as the weight preponderates, is not erroneous, though argumentative.[9] In a case in which witnesses have testified as positively on one side that a fact is not true as on the other side that such fact is true, the court may properly refuse to instruct that positive testimony is entitled to more weight than

[4] McLean v. Erie R. Co. (N. J.), 54 Atl. 238.

[5] Hildman v. City of Phillips, 106 Wis. 611, 82 N. W. 566; Selensky v. Chicago G. W. R. Co. 120 Iowa, 113, 94 N. W. 272; Olsen v. Oregon S. L. & U. N. R. Co. 9 Utah, 129, 33 Pac. 623.

A charge explaining the difference between the probative value of positive and negative testimony is erroneous of course where there is no evidence upon which to base it, Humphries v. S. 100 Ga. 260, 28 S. E. 25.

[6] Rhodes v. U. S. 79 Fed. 740. See Hess v. Williamsport & N. B. R. Co. 181 Pa. St. 492, 37 Atl. 568.

[7] Southern R. Co. v. O'Bryan (Ga.), 45 S. E. 1001.

[8] Gable v. Ranch, 50 S. Car. 95, 27 S. E. 555.

[9] West Chicago St. R. Co. v. Mueller, 165 Ill. 499, 46 N. E. 373; see Kelley v. Schupp, 60 Wis. 86, 18 N. W. 725.

negative, since it is largely within the discretion of the court to give such an instruction.[10]

[10] Denver & R. G. R. Co. v. Lorentzen, 79 Fed. 291.

CHAPTER X.

RELATING TO WITNESSES.

Sec.
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§ 206. **Jury judges of credibility of witnesses.**—The jury are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony, and the court, if requested, should instruct the jury accordingly, and the refusal to so instruct is error.[1] Especially where the witnesses on each

[1] Lensing v. S. (Tex. Cr. App.), 45 S. W. 572; S. v. Washington, 107 La. 298, 31 So. 638; Parkins v. Missouri Pac. R. Co. (Neb.), 93 N. W. 197; Newport v. S. 140 Ind. 299, 39 N. E. 926; Jones v. Casler, 139 Ind. 382, 38 N. E. 812, 47 Am. St. 274; Lefler v. S. 122 Ind. 206, 23 N. E. 154; Durham v. S. 120 Ind. 467, 22 N. E. 333; Finch v. Bergins,

side are about equal in number and credibility, and the testimony of those on the one side is in direct conflict with the testimony of those on the other side, should the question of the credibility of the witnesses be exclusively for the jury.[2] The court can scarcely err in refusing to give instructions which seem to have a tendency to influence the jury as to the credit to be given particular witnesses.[3] It is within the discretion of the court to give or refuse instructions as to whether any occurrences or scenes taking place during the progress of the trial, such, for instance, as where a party or witness becomes hysterical, should be considered by the jury or not in weighing the evidence.[4]

§ 207. Instructions violating the rule—Illustrations.—The following cases serve as illustrations showing violations of the foregoing rule in the giving of instructions: Where the testimony of several disinterested witnesses is not contradicted and is not inherently improbable it is error to instruct the jury that they "are not bound to believe the testimony of any of the witnesses;"[5] as it is to instruct that the jury have the right to disregard the testimony of the witnesses for the defendant if

89 Ind. 360; S. v. Dickey, 48 W. Va. 325, 37 S. E. 695; Bowers v. P. 74 Ill. 418; Hughes Cr. Law, § 3017, citing, Bean v. P. 124 Ill. 580, 16 N. E. 656; Spahn v. P. 137 Ill. 543, 27 N. E. 688; Shotz v. P. 121 Ill. 562, 13 N. E. 524; Peoples v. McKee, 92 Ill. 397; Jordan v. S. 81 Ala. 20, 1 So. 577; Dixon v. S. 46 Neb. 298, 64 N. W. 961; S. v. Todd, 110 Iowa, 631, 82 N. W. 322; Gott v. P. 187 Ill. 249, 58 N. E. 293; Southern M. Ins. Co. v. Hudson, 113 Ga. 434, 38 S. E. 964; Howell v. S. 61 Neb. 391, 85 N. W. 289; Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873; S. v. Tate, 156 Mo. 119, 56 S. W. 1099; Chavarria v. S. (Tex. Cr. App.) 62 S. W. 312; Strong v. S. 61 Neb. 35, 84 N. W. 410; Stewart v. Anderson, 111 Iowa, 329, 82 N. W. 770; S. v. Adair, 160 Mo. 391, 61 S. W. 187; S. v. Taylor, 57 S. Car. 483, 35 S. E. 729, 76 Am. St. 575.

[2] Mitchell v. S. 43 Fla. 188, 30 So. 803.

[3] Atchison, T. & S. F. R. Co. v. Feehan, 149 Ill. 202, 212, 36 N. E. 1036; Faulkner v. Paterson R. Co. 65 N. J. L. 181, 46 Atl. 765.

[4] Chicago & E. R. Co. v. Meech, 163 Ill. 305, 45 N. E. 291.

The question of the competency of a witness is primarily one to be decided by the court. If the question of competency depends upon the existence of facts which are disputed, the proper practice is for the court by preliminary examination to determine whether such facts exist. If, however, the determination of the question depends upon the decision of intricate questions of fact, the court has the power in its discretion to take the opinion of the jury thereon,

Dowdy v. Watson, 115 Ga. 42, 41 S. E. 266, citing 1 Greenleaf Ev. (16th ed.), § 81e.

[5] Tyler v. Third Ave. R. Co. 41 N. Y. S. 523, 18 Misc. 165.

they consider them interested, even though they are not contradicted or impeached.[6]

So an instruction stating that the jury are not at liberty to reject the testimony of any witness because his statements may be in conflict with that of other witnesses is improper, as invading the province of the jury.[7] For the court to charge the jury to scan with caution the testimony of abandoned women, for the same reason, is error.[8] Or to instruct the jury to give the testimony of the witnesses for the state the same weight as is given to the testimony of the witnesses for the defense is likewise improper.[9]

§ 208. Intimating opinion by instruction.—The jury being the sole judges of the credibility of the witnesses, the court, in giving instructions, should guard against the expression or intimation of any opinion as to their credibility or the weight of their testimony.[10] Error committed by the court in thus expressing or intimating an opinion on the weight or sufficiency of the evidence is not cured by the giving of other instructions, that the jury are the sole judges of the credibility of the witnesses and the weight of the evidence.[11] It matters not that the testimony of a witness may appear to be false and not worthy of belief, the court should refrain from intimating any opinion as to what credit should be attached to it.[12] The court therefore cannot tell the jury that one part of the testimony of a witness is to be given more weight than another part.[13]

[6] Berzevizy v. Delaware, L. & W. Co. 46 N. Y. S. 27, 19 App. Div. 309.

[7] F. Dohman Co. v. Niagara Fire Ins. Co. 96 Wis. 38, 71 N. W. 69. See Chisholm v. Preferred Bankers' Life Ass'n, 112 Mich. 50, 70 N. W. 415.

[8] S. v. Tuttle, 67 Ohio St. 440, 66 N. E. 524, 93 Am. St. 689.

[9] Evans v. S. 95 Ga. 468, 22 S. E. 298.

[10] Crutchfield v. Richmond & R. Co. 76 N. Car. 320; Com. v. Barry, 91 Mass. (9 Allen), 276; McMinn v. Whalen, 27 Cal. 319; Ross v. S. 59 Ga. 249; S. v. White, 15 S. Car. 293; Berliner v. Travelers' Ins. Co. 121 Cal. 451, 53 Pac. 922; Hudson v. Best, 104 Ga. 131, 30 S. E. 688; P. v. Lyons, 49 Mich. 78, 13 N. W. 365; Letts v. Letts, 91 Mich. 596, 52 N. W. 54; Leise v. Meyer, 143 Mo. 547, 45 S. W. 282; P. v. Gorman, 83 Hun, 605, 31 N. Y. S. 1064; Ter. v. O'Hare, 1 N. Dak, 30, 44 N. W. 1003; Mawich v. Elsey, 47 Mich, 10, 8 N. W. 587, 10 N. W. 57; S. v. Kelly, 73 Mo. 608.

[11] P. v. Kindleberger, 100 Cal. 367, 34 Pac. 852; Shorb v. Kinzie, 100 Ind. 429. See P. v. Carey, 125 Mich. 535, 84 N. W. 1087; S. v. Dick, 60 N. Car. 440; P. v. Chew Sing Wing, 88 Cal. 288.

[12] Thompson v. S. 106 Ala. 67, 17 So. 512; Bell v. Ober & Sons Co. 96 Ga. 214, 23 S. E. 7.

[13] Owen v. Palmour, 111 Ga. 885, 36 S. E. 969.

While courts may, in a general way, state what facts may be taken into consideration in determining the credit to be given the testimony of a witness, yet where the evidence is conflicting or nearly evenly balanced, care should be exercised to prevent the expression or intimation of an opinion on the weight of the evidence.[14] For the court in charging the jury, to state that "my observation is that pretty good persons sometimes lie, and that pretty bad persons sometimes tell the truth; you should consider the character of the witness so far as you know it as bearing upon the question whether a witness would be truthful and reliable or not," is error, and is not cured by another instruction which states that the verdict must be based upon the evidence; that nothing is to be found by conjecture.[15]

§ 209. **Interested witness corroborated.**—The court is not authorized to state to the jury, as a matter of law, that one witness is entitled to more credit than another;[16] or that the testimony of the one is entitled to more weight than that of the other, whether the one may be disinterested and the other interested or not.[17] Nor is it proper to instruct that "as a general rule a witness who is interested in the result of a suit will not be as honest, candid and fair in his testimony as one who is not so interested."[18] But a charge that the testimony of an interested witness should be examined with greater care than that of a disinterested witness has been held proper.[19]

It is improper for the court to instruct that but little or no credence should be given to the testimony of a witness because of his ill will, although such bias is always proper to be considered by the jury in weighing the testimony of such witness.[20] On the same principle it is improper to charge the jury that the testimony of a witness who is corroborated, is entitled to

[14] Smith v. Chicago & W. I. R. Co. 105 Ill. 511, 521; Wabash R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 284.

[15] Johnson v. Superior R. Tr. R. Co. 91 Wis. 233, 64 N. W. 753.

[16] Omaha B. R. Co. v. McDermott, 25 Neb. 714, 41 N. W. 648.

[17] Platz v. McKean Tp. 178 Pa. St. 601, 36 Atl. 136.

[18] Boyce v. Palmer, 55 Neb. 389, 75 N. W. 848; Veatch v. S. 56 Ind. 184; Grier v. S. 53 Ind. 420. See Johnson v. P. 140 Ill. 352, 29 N. E. 895; Lee v. S. 74 Wis. 45, 41 N. W. 960; Nelson v. Vorce, 55 Ind. 455; Pratt v. S. 56 Ind. 179.

[19] Hinton v. Cream City R. Co. 65 Wis. 335, 27 N. W. 147.

[20] Norwood v. S. (Ala.), 24 So. 53. See, also, Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213; Unruh v. S. 105 Ind. 117, 4 N. E. 453.

greater weight than the testimony of one uncorroborated.[21] Or that a witness may have a better opportunity of knowing the facts in issue than others, will not warrant the court in instructing the jury that such witness is entitled to greater credit than such other witnesses. Where two witnesses are equally intelligent, equally truthful, fair and unprejudiced, the proposition may be true. But a person may have every means of being fully and accurately informed, and yet for various reasons might be utterly unworthy of belief.[22]

So it is likewise improper for the court to state to the jury that the oral testimony of witnesses is entitled to greater weight than the depositions of absent witnesses.[23] For the same reason it is improper for the court to charge the jury that "where the testimony of witnesses is irreconcilably conflicting they should give great weight to the surrounding circumstances in determining which witness is entitled to credit."[24]

§ 210. Praising or denouncing witnesses.—The credibility of the witnesses and the weight of the evidence being questions for the jury to determine, it is improper to call attention to the testimony of a witness in words of praise as impressing one with its truthfulness, or to speak of the witness in terms of denunciation.[25] Nothing should be said by the court intimating a disbelief of a witness.[26] Accordingly an instruction calling the attention of the jury to a certain witness who had given testimony to the bad character of another witness, stating that "he comes to blacken the character of his half-sister instead of defending her," is improper and erroneous.[27]

[21] Chittenden v. Evans, 41 Ill. 251.

[22] Milliken v. Marlin, 66 Ill. 22.

[23] Miller v. Eglin, 64 Ind. 197, 31 Am. R. 121.

Where in order to prevent a continuance the prosecution admits that the facts stated in the defendant's affidavit for a continuance may be given in evidence, then the defendant is entitled to have the jury instructed that the facts so admitted shall be given the same weight as if the absent witness were personally present testifying, and a refusal to so instruct is error, Lee v. S. 75 Miss. 625, 23 So. 628.

[24] Skow v. Locks (Neb.), 91 N. W. 204.

[25] Little v. Superior Rapid Tr. Co. 88 Wis. 462, 60 N. W. 705; Hickory v. United States, 160 U. S. 408, 16 Sup. Ct. 327.

[26] Williams v. City of West Bay, 119 Mich. 395, 78 N. W. 328; P. v. Brow, 35 N. Y. S. 1009, 90 Hun (N. Y.) 509.

[27] Spicer v. S. 105 Ala. 123, 16 So. 706. See Hickory v. United States, 160 U. S. 408, 16 Sup. Ct. 327. See Smith v. United States, 161 U. S. 85, 16 Sup. Ct. 483; Hicks v. United States, 150 U. S. 442, 16 Sup. Ct. 144.

While it may not be improper for the court, in charging the jury, to repeat the uncontradicted testimony of witnesses and point out the inquiries suggested by such testimony,[28] yet it is improper for the court to state what a witness may have said on any particular matter.[29]

§ 211. Expert and non-expert witnesses.—According to the foregoing rule it is improper for the court to instruct the jury, as a matter of law, that the testimony of one class of witnesses—experts or non-experts—is entitled to greater weight than that of the other.[30] So it is improper for the court to say to the jury that the testimony of a certain witness should be received with caution, as the opinions of such witnesses, however honestly entertained, may be erroneous, whether the witness is an expert or not.[31]

The weight and credibility of the testimony of expert witnesses are to be determined by the same rules that apply to any other witness, and such testimony should be considered by the jury in connection with all the other evidence.[32] The weight of the opinions of expert witnesses is exclusively for the jury.[33] Hence an instruction that the testimony of expert witnesses is usually "of little value" or "of great value," is improper, in that it invades the province of the jury. The court should

[28] S. v. Glover, 27 S. Car. 602, 4 S. E. 564.

[29] Killain v. Eigenmann, 57 Ind. 488; Cunningham v. S. 65 Ind. 380, the court should not in any manner suggest or intimate an opinion as to the value or weight of the testimony of witnesses.

[30] Taylor v. Cox, 153 Ill. 230, 33 N. E. 656; Ryder v. S. 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. 334; Nelson v. McLennan, 31 Wash. 208, 71 Pac. 747. See, also, Durham v. Smith 120 Ind. 468, 22 N. E. 333; Bradley v. S. 31 Ind. 492.

[31] Louisville, N. O. & T. R. Co. v. Whitehead, 71 Miss. 451, 15 So. 890, 42 Am. St. 472; Tarbell v. Forbes, 177 Pa. St. 238; P. v. Seaman, 107 Mich. 348, 65 N. W. 203; Weston v. Brown, 30 Neb. 609, 46 N. W. 826. Contra: Haight v. Vallet, 89 Cal. 245, 26 Pac. 897.

[32] Goodwin v. S. 96 Ind. 550; Eggers v. Eggers, 57 Ind. 461; Alabama G. S. R. Co. v. Hill, 93 Ala. 514, 9 So. 722; Epps v. S. 102 Ind. 539, 1 N. E. 491; Langford v. Jones, 18 Ore. 307, 22 Pac. 1064; Thornton v. Thornton, 39 Vt. 122; Williams v. S. 50 Ark. 511, 9 S. W. 5; Wagner v. S. 116 Ind. 181, 17 N. E. 833; S. v. McCullough (Iowa), 55 L. R. A. 378.

[33] White v. S. 133 Ala. 122, 32 So. 139; Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. 566; Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072; Taylor v. Cox, 153 Ill. 220, 38 N. E. 656; Louisville, N. O. & T. R. Co. v. Whitehead, 71 Miss. 451, 15 So. 890; Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842; Mewes v. Crescent P. L. Co. 170 Pa. St. 369, 32 Atl. 1082; Tatum v. Mohr, 21 Ark. 349; Johnson v. Thompson, 72 Ind. 167; Roberts v. Johnson, 58 N. Y. 613; Ætna L. Ins. Co. v. Ward, 140 U. S. 76, 11 Sup. Ct. 720.

make no comments intimating its opinion as to the weight of such testimony either favorable or unfavorable.[34] But where the opinion of an expert witness is based upon an hypothetical state of facts, and the supposed facts are not sustained by the evidence, then it is proper to instruct the jury that such opinion is of little or no weight.[35]

The facts upon which the question to the expert is based must be substantially proved to entitle his opinion to be of any value.[36] And it has been held that an instruction stating that "if one fact supposed to be true, included in the hypothetical question, is untrue—not supported by the evidence, then the opinion of the expert would be valueless," is proper.[37] Also to state that the testimony of an expert should be weighed and considered by the jury with caution, is improper, in that it singles out the witness and discredits his testimony.[38] Or an instruction which assumes or conveys the impression that an examination made by an expert may not have been impartial is erroneous.[39]

§ 212. Witnesses contradicting each other.—The fact that two witnesses directly contradict each other does not warrant the giving of an instruction that the evidence is balanced unless there is some other circumstance corroborating the one or the other,[40] or that where two witnesses have contradicted each

[34] Eggers v. Eggers, 57 Ind. 461; P. v. Webster, 59 Hun (N. Y.), 398; Persons v. S. 90 Tenn. 291, 16 S. W. 726; Pannell v. Com. 86 Pa. St. 260; Reichenbach v. Ruddach, 127 Pa. 564, 18 Atl. 432; Kansas City, W. & N. W. R. Co. v. Ryan, 49 Kas. 1, 30 Pac. 108; Williams v. S. 50 Ark. 511, 9 S. W. 598; Brush v. Smith, 111 Iowa, 217, 82 N. W. 467; Long v. Travellers' Ins. Co. 113 Iowa, 259, 85 N. W. 24; Bever v. Spangler, 93 Iowa 576, 61 N. W. 1072; P. v. Vanderhoof, 71 Mich. 158, 39 N. W. 28; Wall v. S. 112 Ga. 336, 37 S. E. 371; Maynard v. Vinton, 59 Mich. 139, 26 N. W. 401; Melvin v. Easly, 46 N. Car. 386.

Contra, holding entitled to great Weight: Tinney v. New Jersey Steamboat Co. 12 Abb. Pr. (N. Y.), 3; St. Louis, I. M. & S. R. Co. v. Phillips, 66 Fed. 35; S. v. Reidell, 9 Houst. (Del.), 479, 14 Atl. 550; Laflin v. Chicago, W. & N. R. Co. 33 Fed. 422; S. v. Owen, 72 N. Car 605.

[35] Goodwin v. S. 96 Ind. 550; Hall v. Rankin, 87 Iowa, 261, 57 N. W. 217.

[36] Hovey v. Chase, 52 Me. 304, 83 Am. Dec. 514; Treat v. Bates, 27 Mich. 390.

[37] P. v. Foley, 64 Mich. 148, 31 N. W. 94. But see Epps v. S. 102 Ind. 539, 1 N. E. 491.

[38] Gustafson v. Seattle Tr. Co. 28 Wash. 227, 68 Pac. 721. In re Blake's Estate, 136 Cal. 306, 68 Pac. 827. See S. v. McCullough, 114 Iowa, 532, 87 N. W. 503, 55 L. R. A. 378; P. v. Seaman, 107 Mich. 348, 65 N. W. 203; Coleman v. Adair, 75 Miss. 660, 23 So. 369.

[39] S. v. Rathbun, 74 Conn. 524, 51 Atl. 540.

[40] Sickle v. Wolf, 91 Wis. 396,

other that one of them has told a falsehood.[41] An instruction that the jury may disregard the testimony of certain witnesses for the reason that they had contradicted each other is erroneous; the jury may, in their judgment, give credit to some of them and disregard the others, notwithstanding such contradiction.[42]

So a charge that if the state has but one witness who swears to the guilt of the accused, and the accused contradicts the testimony of such witness and swears to his innocence, then the facts are uncertain and leaves the question of the guilt of the accused in doubt, is erroneous.[43] But it has been held that an instruction which in substance charges that if the plaintiff and the defendant as witnesses are equally credible, and contradict each other on material facts, then there is no preponderance in favor of the plaintiff, and that the fact that they disagree in their testimony, if each honestly has stated the facts as he understood them to be, would not of itself warrant them in discrediting either of them, is not objectionable as invading the province of the jury.[44] An instruction that if the jury believe a certain witness and that the facts as testified to by him are true, they shall find for the plaintiff; but that if they do not believe him, and believe the facts are as testified to by other witnesses, they shall find for the defendant, is proper.[45]

§ 213. Reconciling conflicting testimony.—Where the testimony of the witnesses is conflicting it is proper for the court to charge that the jury should reconcile any conflicts, if they can do so, in order to give effect to the testimony of all the witnesses.[46] But the contrary seems to be the rule in Texas. Thus it has been held to be improper for the court to charge the jury that "you will reconcile any conflicts in the evidence if you can, so as to give effect to all the testimony; but if you

64 N. W. 1028. Compare Chicago & E. T. R. Co. v. Rains, 203 Ill. 422, 67 N. E. 840.

[41] P. v. Brow, 35 N. Y. S. 1009, 90 Hun, 509.

[42] S. v. Bazile, 50 La. Ann. 21, 23 So. 8. See Goodhue v. Farmers' W. Co. v. Davis, 81 Minn. 210, 83 N. W. 531.

[43] S. v. Johnson, 48 La. Ann. 87, 19 So. 213. See McLean v. Clark, 47 Ga. 24.

[44] Cottrell v. Piatt, 101 Iowa, 231, 70 N. W. 177.

[45] Harris v. Murphy, 119 N. Car. 34, 25 S. E. 708, 56 Am. St. 656.

[46] Price v. S. 114 Ga. 855, 40 S. E. 1015; Steen v. Sanders, 116 Ala. 155, 22 So. 498; Walters v. Philadelphia Tr. Co. 161 Pa. St. 36, 28 Atl. 941; Ter. v. Gonzales (N. Mex.), 68 Pac. 925; Oliver v. Columbia N. & L. R. Co. 65 S. Car. 1, 43 S. E. 307.

cannot, you will decide which of the witnesses is entitled to the greater credibility and weight, and in so determining, you may consider the intelligence, interest, bias, or prejudice, if any, of said witnesses as well as their manner of testifying," the court holding it to be a comment on the weight of the evidence.[47]

§ 214. Interest of witness to be considered.—In determining the weight to be given to the testimony of the witnesses, in either a civil or criminal case, the court, in charging the jury, may state that they have the right to take into consideration the interest, if any, a witness may have in the result of the suit, together with all the other evidence in the case.[48] Especially where the plaintiff or defendant, when a witness in his own behalf, is contradicted on material matters by other credible evidence, is it the duty of the court, if so requested, to instruct the jury as to his interest, if any, in the result of the suit.[49]

Accordingly an instruction stating that while the defendant is a competent witness, yet the jury have a right to take into consideration his interest in the result of the trial, and all the facts and circumstances in the case, and give his testimony only such weight as they, in their judgment, think it entitled to, is proper.[50]

It is not error to instruct that the presumption that a witness will speak the truth may be repelled by proof of his interest or bias. This amounts to telling them that interest and bias

[47] Kellog v. McCabe (Tex. Cv. App.), 38 S. W. 542; Houston, E. & W. T. R. Co. v. Richards (Tex. Cv. App.), 49 S. W. 687. See Crane v. S. 111 Ala. 45, 20 So. 590.

[48] Ammerman v. Teeter, 49 Ill. 402; Evans v. Lipscomb, 31 Ga. 71; Lampe v. Kennedy, 60 Wis. 100, 18 N. W. 730; Hellyer v. P. 186 Ill. 550, 58 N. E. 245; Chezem v. S. 56 Neb. 496, 76 N. W. 1056; Lynch v. Bates, 139 Ind. 206, 38 N. E. 806; Smith v. S. 142 Ind. 288, 41 N. E. 595.

[49] Becker v. Woarms, 76 N. Y. S. 438, 72 App. Div. 196. See Lancashire Ins. Co. v. Stanley, 70 Ark. 1, 62 S. W. 66; Kavanaugh v. City of Wausau (Wis.), 98 N. W. 553.

[50] Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318; Smith v. S. 107 Ala. 139, 18 So. 306; S. v. Ryan, 113 Iowa, 536, 85 N. W. 812; P. v. O'Neil, 67 Cal. 378, 7 Pac. 790; P. v. Calvin, 60 Mich. 114, 26 N. W. 851; Hellyer v. P. 186 Ill. 550, 58 N. E. 245; Hamilton v. S. 62 Ark. 543, 36 S. W. 1065; S. v. McCann, 16 Wash. 249, 47 Pac. 443; S. v. Carey, 15 Wash. 549, 46 Pac. 1050; S. v. Fiske, 63 Conn. 392, 28 Atl. 572; S. v. Turner, 110 Mo. 196, 19 S. W. 645; Emery v. S. 101 Wis. 627, 78 N. W. 145; P. v. Hertz, 105 Cal. 660, 39 Pac. 32; Ter. v. Gatliff (Okla.), 37 Pac. 809; P. v. Hitchcock, 104 Cal. 482, 38 Pac. 198; P. v. Jones, 24 Mich. 216. See, also, S. v. McGinnis, 76 Mo. 326; S. v. Zorn, 71 Mo. 415; S. v. Bohan, 19 Kas. 35.

may be considered by them in weighing the testimony of the witness.[51]

§ 215. Probability, improbability, manner, conduct, bias.—The court may instruct that the jury may consider the inherent probability or improbability of the testimony of the witnesses;[52] that they may also consider any feeling, bias or partiality shown by the witnesses, if any.[53] And it is also proper to instruct that the jury may take into consideration the manner, conduct and appearance of a witness while on the witness stand;[54] and the jury may also consider the intelligence or want of intelligence of a witness in weighing his testimony.[55]

But to instruct that the jury may consider the demeanor and conduct of the accused as a witness, "during the trial," is error.[56] But in Texas the courts hold that an instruction which directs the jury that in determining the truth of the testimony they may consider the inelligence, interest, and apparent bias or prejudice of the witnesses is erroneous, in that it invades the province of the jury.[57] And in the same state, charging the jury that "in passing on the credibility of the witnesses, you may

[51] P. v. Amaya, 134 Cal. 531, 66 Pac. 794.

[52] McNeile v. Cridland, 6 Pa. Super. Ct. 428; Hale Elevator Co. v. Hall, 201 Ill. 131, 66 N. E. 249; Aspy v. Botkins, 160 Ind. 170, 66 N. E. 462.

[53] Blashfield Instructions, § 260, citing: S. v. Nat, 51 N. Car. 114 (feeling); Telker v. S. 54 Ark. 489, 16 S. W. 663; S. v. Bohan, 19 Kas. 35; P. v. Cronin, 34 Cal. 192; P. v. Wheeler, 65 Cal. 77, 2 Pac. 892; S. v. Streeter, 20 Nev. 403, 22 Pac. 758; S. v. Fiske, 63 Conn. 392, 28 Atl. 572; S. v. Adair, 160 Mo. 392, 61 S. W. 187. Contra: Oliver v. S. (Tex. Cr. App.), 42 S. W. 554; Isham v. S. (Tex. Cr. App.), 41 S. W. 622.

[54] S. v. Adair, 160 Mo. 391, 61 S. W. 187; Georgia Home Ins. Co. v. Campbell, 102 Ga. 106, 29 S. E. 148; S. v. Hoshor, 26 Wash. 643, 67 Pac. 386; S. v. Burton, 27 Wash. 528, 67 Pac. 1097; Brown v. Stacy, 5 Ark. 403; Ter. v. Leyba (N. Mex.), 47 Pac. 718. But see P. v. Newcomer, 118 Cal. 263, 50 Pac. 405.

[55] North C. St. R. Co. v. Wellner, 206 Ill. 277, 69 N. E. 6. See Pennsylvania Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. 1071.

An instruction that the jury, in weighing the testimony of witnessses may consider the fact that they were called by the court is improper. The testimony of witnesses called by the court must be subjected to the same tests as that of other witnesses, Smith v. City of Seattle (Wash.), 74 Pac. 676.

[56] Purdy v. P. 140 Ill. 46, 29 N. E. 700; Vale v. P. 161 Ill. 310, 43 N. E. 1091.

The jury may be directed that they have a right to consider their knowledge of men which they have acquired in their experience, Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 50 N. E. 760.

[57] Doggett v. S. 39 Tex. Cr. App. 5, 44 S. W. 842; Williams v. S. (Tex. Cr. App.), 40 S. W. 801; Isham v. S. (Tex. Cr. App.), 41 S. W. 622; Harreli v. S. 37 Tex. Cr. App. 612, 40 S. W. 799. See Lancaster v. S. 36 Tex. Cr. App. 16, 35 S. W. 165.

consider the age, intelligence, interest in the case, apparent prejudice, if any, and all the other circumstances in evidence before you," is held to be improper as bearing upon the weight of the evidence.[58] And this same rule prevails in other states besides Texas.[59]

§ 216. Instructions that jury "must" or "should" consider. A charge that in determining the credibility of the witnesses and of the weight of their testimony the jury must take into consideration the interest, the appearance upon the witness stand, the intelligence, the opportunities for learning the truth concerning the things testified about, the apparent candor and correctness of the statements as compared with the usual and ordinary nature of things, is not objectionable in the use of the word "must." It is the duty of the jury to consider these things in weighing the testimony. "Must" implies no more than the idea of duty.[60] It has been held that a charge directing the jury that they "should" take into consideration the intelligence of a witness is improper. The jury may, or are at liberty to take into consideration the intelligence of a witness, but they are not bound to do so.[61]

§ 217. On disregarding testimony.—While the jury cannot arbitrarily disregard the testimony of a credible witness,[62] yet they are not bound to believe the testimony of a witness merely because he has sworn positively to a material fact or state of facts, and it is proper for the court so to instruct them. Thus,

[58] Oliver v. S. (Tex. Cv. App.), 42 S. W. 554; Peny v. S. (Tex. Cr. App.), 42 S. W. 297; Shields v. S. 39 Tex. Cr. App. 13, 44 S. W. 844; Houston, E. & W. T. R. Co. v. Runnels (Tex.), 47 S. W. 971.

[59] Buckley v. S. 62 Miss. 705 (defendant); Wright v. Com. 85 Ky. 123, 2 S. W. 904.

[60] Fifer v. Ritter, 159 Ind. 11, 64 N. E. 463; Keesier v. S. 154 Ind. 242, 56 N. E. 232; S. v. Dotson, 26 Mont. 305, 67 Pac. 938; Stanley v. Cedar Rapids & M. C. R. Co. 119 Iowa, 526, 93 N. W. 489; City of Harvard v. Crouch, 47 Neb. 133, 66 N. W. 276 (interest); S. v. Hilsabeck (Mo.), 34 S. W. 38; Deal v. S. 140 Ind. 368, 39 N. E. 390. The following cases in Indiana are no longer authority on this proposition: Woolen v. Whitacre, 91 Ind. 502; Unruh v. S. 105 Ind. 118, 4 N. E. 453; Duval v. Kenton, 127 Ind. 178.

[61] Smith v. S. 142 Ind. 288, 41 N. E. 595; Pennsylvania Co. v. Hunsley, 23 Ind. App. 37, 54 N. E. 1071. See S. v. Bryant (Mo.), 35 S. W. 597 ("should" or "may"); Wabash R. Co. v. Biddle, 27 Ind. App. 161, 59 N. E. 284. See also Bird v. S. 107 Ind. 154, 8 N. E. 14; Unruh v. S. 105 Ind. 118, 4 N. E. 453.

[62] Hall v. S. 134 Ala. 90, 32 So. 750; McMahon v. P. 120 Ill. 584, 11 N. E. 883.

an instruction that the jury are not necessarily bound to believe anything to be a fact because a witness has stated it to be so, provided the jury believe, from the evidence, that such witness is mistaken or has sworn wilfully falsely as to such fact, is proper.[63]

And where the testimony of the witnesses appears to be wholly irreconcilable and the credibility of some of them is questioned, it is proper for the court to instruct that the jury may entirely or in part disregard the testimony of any witness they believe to have testified wilfully falsely.[64] But to instruct that the jury may disregard the testimony of any witness interested in the result of the trial, "if in their judgment it is right to do so," is improper.[65] So to instruct that the jury may, if they think proper, disregard the testimony of any witness, if for any reason they believe it to be untrue, is error.[66] Or to instruct that the jury are not at liberty to disregard the testimony of a witness who has been corroborated by other credible evidence, is error if the word "disregard" may be considered as synonymous with the words "refuse to consider," as implying that the testimony of an uncorroborated witness need not be considered by them.[67]

§ 218. On swearing wilfully falsely.—The jury may disregard the entire testimony of a witness where the evidence shows that he has wilfully or knowingly sworn falsely to a material matter unless his testimony is corroborated by other credible evidence, and it is error for the court to refuse to so instruct.[68] Especially should such an instruction be given for the defendant,

[63] Goss Printing Pr. v. Lempke, 191 Ill. 201, 60 N. E. 968. See also Davis v. Northern E. R. Co. 170 Ill. 602, 48 N. E. 1058; S. v. Smallwood, 75 N. Car. 104.

[64] Gerdes v. Christopher & S. A. I. & F. Co. (Mo.), 27 S. W. 615.

[65] Rucker v. S. (Miss.), 18 So. 121.

[66] Rylee v. S. 75 Miss. 352, 22 So. 890; Jackson v. Com. 17 Ky. L. R. 1350, 34 S. W. 901. Compare, Hunter v. S. 29 Fla. 486, 10 So. 730.

[67] P. v. Compton (Cal.), 56 Pac. 44.

[68] Rider v. P. 110 Ill. 11; Plummer v. S. 111 Ga. 839, 36 S. E. 233; Churchwell v. S. 117 Ala. 124, 23 So. 72; Osborn v. S. 125 Ala. 106, 27 So. 758; Yundt v. Hartrunft, 41 Ill. 16; P. v. Wilder, 134 Cal. 182, 66 Pac. 228; S. v. Perry, 41 W. Va. 641, 24 S. E. 634; Bunce v. McMahon, 6 Wyo. 24, 42 Pac. 23, (held not singling out witness); P. v. Petmecky, 99 N. Y. 415 (defendant), 2 N. E. 145; Mead v. McGraw, 19 Ohio St. 61; Seligman v. Rogers, 113 Mo. 642, 21 S. W. 94; Bevelot v. Lestrade, 153 Ill. 625, 38 N. E. 1056; Lyts v. Keevey, 5 Wash. 606, 32 Pac. 534.

in a criminal case, where one of like nature has been given for the prosecution.[69] And it is proper to instruct that if the jury conclude that any witness has sworn wilfully falsely as to any material matter they may reject or treat as untrue the whole or any part of his testimony.[70] But the jury are not bound to reject the whole of the testimony of such witness and they may be so instructed by the court.[71]

It is the privilege of the jury in such case to disregard the testimony of such a witness, but the court cannot, as a matter of law, direct that they "should" disbelieve it.[72] But it has been held that the giving of such an instruction is within the sound discretion of the court, and the refusal to give it is not to be regarded as of sufficient error upon which to reverse, especially where other instructions given relating to the credibility of the witnesses cover the omission.[73] An error committed by using the word "intentionally" in an instruction instead of "knowingly and wilfully," as to the credibility of a witness is harmless, when the instruction is read in connection with another, charging that in determining the weight to be given to the testimony of witnesses, the jury may consider their appearance and manner and interest in the suit.[74]

§ 219. On swearing falsely—Improper.—An instruction advising the jury that they are at liberty to disregard the testimony of a witness if he has intentionally misstated or concealed material facts which does not contain the qualifying clause, to wit, "unless his testimony is corroborated by other credible

[69] Gorgo v. P. 100 Ill. App. 130.

[70] S. v. Martin, 124 Mo. 514, 28 S. W. 12; First Nat. Bank v. Minneapolis & N. E. Co. 11 N. Dak. 280, 91 N. W. 436 (omitting the words "material matter" does not render the instruction bad).

[71] S. v. Thompson, 21 W. Va. 746.

[72] Higbee v. McMillan, 18 Kas. 133; Reynold v. Greenbaum, 80 Ill. 416; P. v. Oldham, 111 Cal. 648, 44 Pac. 312; Callanan v. S. 24 Iowa, 441; Lowe v. S. 88 Ala. 8, 7 So. 97; Litton v. Young, 2 Metc. (Ky.), 565; P. v. O'Neil, 109 N. Y. 251, 16 N. E. 68; Senter v. Carr, 15 N. H. 351. Contra: S. v. Hale, 156 Mo. 102, 56 S. W. 881; S. v. Kellerman, 14 Kas. 135; Dunlop v. Patterson, 5 Cow. (N. Y.), 243; Stoffer v. S. 15 Ohio St. 47; S. v. Musgrave, 43 W. Va. 672, 28 S. E. 813; S. v. Burton (Ala.), 22 So. 585; McClellan v. S. 117 Ala. 140, 23 So. 653; Wastl v. Montana N. R. Co. 17 Mont. 213, 42 Pac. 772.

[73] Cicero St. R. Co. v. Brown, 193 Ill. 279, 61 N. E. 1093; S. v. Hickman, 95 Mo. 322, 8 S. W. 252; S. v. Banks, 40 La. Ann. 736, 5 So. 18.

[74] Noyes v. Tootle, 48 S. W. 1031; McClure v. Williams, 65 Ill. 390 (wilfully or knowingly).

evidence," is erroneous.[75] And the words "unless his testimony is corroborated by the statements of other credible witnesses," will not alone answer, as the corroboration may be by any credible evidence or by facts inferable therefrom.[76] Also such an instruction must embody the idea that the testimony was wilfully, corruptly or intentionally given by the witness.[77]

The mere fact that a witness has sworn falsely on some material point will not authorize the jury to disregard his testimony. The testimony of the witness must not only be false, but knowingly or corruptly false before the jury are at liberty to disregard it; a witness might even swear corruptly falsely on a material matter and if portions of his testimony are corroborated by other credible evidence, it would not necessarily follow that all his testimony should be disregarded.[78] And the instruction must confine the false swearing to a material matter in issue.[79] And it should be so drawn as to apply to all the witnesses and not single out a particular witness.[80]

§ 220. Impeachment—Instructions based on evidence.—The

[75] Miller v. S. 106 Wis. 156, 81 N. W. 1020; S. v. De Wolfe (Mont.), 77 Pac. 1087; Bratt v. Swift, 99 Wis. 579, 75 N. W. 411; Chittenden v. Evans, 41 Ill. 251; Maxwell v. Williamson, 35 Ill. 529; F. Dohman Co. v. Niagara Fire Ins. Co. 96 Wis. 38, 71 N. W. 69. See Wilson v. Coulter, 51 N. Y. S. 804; Moran v. P. 163 Ill. 372, 45 N. E. 23; Miller v. Madison Car Co. 130 Mo. 517, 31 S. W. 574; Peak v. P. 76 Ill. 289; Jeffries v. S. 77 Miss. 757, 28 So. 948; McDonald v. S. (Miss.), 28 So. 750. Contra: S. v. Sexton, 10 S. Dak. 127, 72 N. W. 84.

[76] Dohman v. Niagara Fire Ins. Co. 96 Wis. 38, 71 N. W. 69. Contra: Brown v. Hannibal & St. J. R. Co. 66 Mo. 599; S. v. Musgrave, 43 W. Va. 672, 28 S. E. 813, holding that the addition of the words "unless corroborated," renders the instruction erroneous.

[77] Ward v. Ward, 25 Colo. 33, 52 Pac. 1105; Jennings v. Kosmak, 45 N. Y. S. 802, 20 Misc. 300; Yundt v. Hartrunft, 41 Ill. 10, 14; Gehl v. Milwaukee Produce Co. 116 Wis. 263, 93 N. W. 26; Prater v. S. 107 Ala. 26, 18 So. 238; S. v. Kyle, 14 Wash. 550, 45 Pac. 147 (holding that "wilfully" is implied in "falsely"); Gottlieb v. Hartman, 3 Colo. 53; S. v. Brown, 64 Mo. 367.

[78] Chittenden v. Evans, 41 Ill. 251, 254; Cahn v. Ladd, 94 Wis. 134, 68 N. W. 652; Shenk v. Hager, 24 Minn. 339; Childs v. S. 76 Ala. 93; Fisher v. P. 20 Mich. 135; Mercer v. Wright, 3 Wis. 645. See also White v. S. 52 Miss. 216; Cahn v. Ladd, 94 Wis. 134; S. v. Sexton, 10 S. Dak. 127, 72 N. W. 84; Skipper v. S. 59 Ga. 63; S. v. Lett, 85 Mo. 52.

[79] P. v. Plyer, 121 Cal. 160, 53 Pac. 553; Ter. v. Lucero, 8 N. Mex. 543, 46 Pac. 18; Cobb v. S. 115 Ala. 18, 22 So. 506; Peak v. P. 76 Ill. 289; Pierce v. S. 53 Ga. 365; White v. S. 52 Miss. 216. Contra: P. v. Ah Sing, 95 Cal. 654, 30 Pac. 796.

[80] City of Spring Valley v. Gavin, 182 Ill. 232, 54 N. E. 1035; P. v. Arlington, 131 Cal. 231, 63 Pac. 347; Argabright v. S. 49 Neb. 760, 69 N. W. 102.

court is authorized to instruct the jury on the law as to the impeachment of witnesses when there is evidence upon which to base the instructions, whether requested to do so or not;[81] and it may be added that under some circumstances the refusal to give such instructions would be error where there is evidence upon which to base them.[82] The failure of the court to instruct on the law as to the impeachment of witnesses cannot be complained of as error in the absence of a request for such instructions.[83] And, of course, if there is no evidence tending to impeach or sustain a witness the court is not bound to give instructions in that respect.[84]

In the giving of instructions relating to the impeachment of witnesses, the court cannot say, as a matter of law, that a witness has been impeached. Whether a witness has or has not been impeached, and to what extent, is a question for the jury to determine.[85] If the jury believe a witness, it is their duty to consider his testimony, notwithstanding an attempt to impeach him.[86] The court may, however, state that there is evidence tending to impeach a witness,[87] or that there is evidence tending to sustain him, when such is the case—without invading the province of the jury.[88] It is not improper, therefore, for the court to state that a witness may be sustained by proof of good character or by other facts and circumstances shown by the evidence.[89]

[81] Ohio & M. R. Co. v. Crancher, 132 Ind. 275, 31 N. E. 941; Ford v. S. 92 Ga. 459, 17 S. E. 667. See Freeman v. S. 112 Ga. 48, 37 S. E. 172. See Smith v. S. 142 Ind. 288, 41 N. E. 595.

[82] Wolfe v. S. 25 Tex. App. 698, 9 S. W. 44; Rose v. Otis, 18 Colo. 59, 31 Pac. 493.

[83] Boynton v. S. 115 Ga. 587, 41 S. E. 995; American T. & T. Co. v. Kersh, 27 Tex. Cv. App. 127, 66 S. W. 74; Levan v. S. 114 Ga. 258, 40 S. E. 252; Downing v. S. 114 Ga. 30, 39 S. E. 927; Hatcher v. S. 116 Ga. 617, 42 S. E. 1018; Anderson v. S. 117 Ga. 255, 43 S. E. 835; Thomas v. S. 95 Ga. 484, 22 S. E. 315; S. v. Kirkpatrick, 63 Iowa, 554, 19 N. W. 660.

[84] Freeman v. S. 112 Ga. 48, 37 S. E. 172; Hart v. S. 93 Ga. 160, 20 S. E. 39. See also, relating to "false in one thing false in all things," S. v. Hale, 156 Mo. 102, 56 S. W. 881; Ingalls v. S. 48 Wis. 647, 4 N. W. 785; S. v. McDevitt, 69 Iowa, 549, 29 N. W. 459; S. v. Palmer, 88 Mo. 568.

[85] Harris v. S. 96 Ala. 27, 11 So. 255; Powell v. S. 101 Ga. 20, 29 S. E. 309; McConkey v. Com. 101 Pa. St. 420.

[86] McCasland v. Kimberlin, 100 Ind. 121; Harris v. S. 96 Ala. 27, 11 So. 255; Smith v. Grimes, 43 Iowa, 365.

[87] Smith v. S. 142 Ind. 288, 41 N. E. 595; Ford v. S. 92 Ga. 459, 17 S. E. 1006; Harris v. S. 96 Ala. 24, 11 So. 255.

[88] Smith v. S. 142 Ind. 288, 41 N. E. 595.

[89] Powell v. S. 101 Ga. 9, 29 S.

§ 221. Believing or disbelieving witness.—It is not improper to instruct that "where it is shown that the reputation of a witness for truth is bad, his evidence is not necessarily destroyed, but it is to be considered under all the circumstances described in the evidence, and given such weight as the jury believe it entitled to, and to be disregarded if they believe it entitled to no weight."[90] An instruction that the jury "are at liberty to disregard the statements of such witnesses, if any there be, who have been sucessfully impeached either by direct contradiction or by proof of general bad character, unless the statements of such witnesses have been corroborated by other evidence which has not been impeached," is not improper.[91]

A charge that the jury "should consider the impeaching evidence introduced, in estimating the weight which ought to be given to the testimony of the witness, and should also, for the same purpose, take into consideration the fact, if they should so find, that the moral character of any witness has been successfully impeached,"[92] is proper. A charge that a witness has either told the truth or that he has perjured himself is erroneous, in that the jury are compelled to find the one way or the other without giving the witness the credit of being mistaken.[93] The failure of the court to charge the jury as to the purpose and effect of impeaching testimony can not be urged as error, where the testimony of the prosecution, which tends to impeach a witness, is met by rebuttal testimony sustaining him, especially in view of the general charge given on the weight of the testimony and the credit to be given to the witnesses.[94]

To instruct that the effect of impeaching evidence is not to exclude the testimony of the witness from the consideration of the jury is improper, as tending to lead the jury to believe that they cannot entirely discredit the testimony of the witness.[95] A charge that "against the credibility of any witness, it is a strong circumstance, weighing heavily, that he is shown to have sworn falsely in regard to some material fact," is im-

E. 309, 65 Am. St. 277; See Hart v. S. 93 Ga. 160, 20 S. E. 39.

[90] S. v. Miller, 53 Iowa, 210, 4 N. W. 838, 900.

[91] Miller v. P. 39 Ill. 463.

[92] Smith v. S. 142 Ind. 288, 41 N. E. 361.

[93] Smith v. Lehigh V. R. Co. 170 N. Y. 394, 63 N. E. 338.

[94] Givens v. S. 35 Tex. Cr. App. 563, 34 S. W. 636.

[95] Crockett v. S. 40 Tex. Cr. App. 173, 49 S. W. 392.

proper.[96] To instruct that "while it is the province of the jury to pass upon the credibility of a witness, nevertheless the law furnishes to the jury certain rules to guide them in determining whether or not a witness has spoken the truth, and the law authorizes the jury to discard altogether the testimony of a witness who has been impeached," is improper, in that it tends to lead the jury to believe that the credibility of the witness depends alone upon the impeaching evidence irrespective of other evidence in the case.[97]

§ 222. **Failure to produce witnesses or evidence.**—It may be stated as a general rule, in either a civil or criminal case, that where a party makes no effort to procure certain material evidence which is peculiarly or exclusively within his knowledge and control, and which, if true, would rebut or meet material evidence introduced against him, the court may, in charging the jury, comment on the failure to produce such evidence and direct the jury to consider such fact in determining the issues.[98] But this rule can have no application to the failure of the defendant in a criminal case to testify in his own behalf, or his failure to call his wife when she is a competent witness and may have knowledge of material facts in issue in the case.[99] So an instruction stating that "when all the circumstances proved raise a strong presumption of the guilt of the accused, his failure to offer any explanation, where in his power to do so, tends to confirm the presumption of his guilt," is clearly erroneous.[100]

[96] Paul v. S. 100 Ala. 136, 14 So. 634.

[97] Osborn v. S. 125 Ala. 106, 27 So. 758. Instructions on impeachment of witnesses held erroneous: Plummer v. S. 111 Ga. 839, 36 S. E. 233; Strong v. S. 61 Neb. 35, 84 N. W. 410; Osborn v. S. 125 Ala. 106, 27 So. 758; Paul v. S. 100 Ala. 136, 14 So. 634; Jarnigan v. Fleming, 43 Miss. 710; Tarbell v. Forbes, 177 Mass. 238, 58 N. E. 873; Dean v. S. 130 Ind. 237, 29 N. E. 911; Higgins v. Wren, 79 Minn. 462, 82 N. W. 859; Gilyard v. S. 98 Ala. 59, 13 So. 391; Spicer v. S. 105 Ala. 123, 16 So. 706.

[98] S. v. Grebe, 17 Kas. 458; Stover v. P. 56 N. Y. 320; Ripley v. Second Ave. R. Co. 8 Misc. (N. Y.), 449; Com. v. Costley, 118 Mass. 1; Flynn v. New York E. R. Co. 50 N. Y. S. 375. See Nicol v. Crittendon, 55 Ga. 497. See S. v. Smallwood, 75 N. Car. 104. See Momence Stone Co. v. Groves, 197 Ill. 93, 64 N. E. 335; Hinshaw v. S. 147 Ind. 334, 47 N. E. 157.

[99] Stutsman v. Ter. 7 Okla. 490, 54 Pac. 707; Doan v. S. 26 Ind. 498; S. v. Grebe, 17 Kas. 458; Com. v. Harlow, 110 Mass. 411.

[100] Clem v. S. 42 Ind. 420, 2 Green C. R. 696, 13 Am. R. 369; Com. v. Hardiman, 9 Gray (Mass.), 136; Gordon v. P. 33 N. Y. 501; Com. v. Pease, 110 Mass. 412.

In civil cases, however, the parties to a cause are included within the rule mentioned. Thus, an instruction that if the jury find there are material and important circumstances appearing in evidence against the defendant, and they further find that the defendant has not satisfactorily explained said circumstances by other evidence, then the fact that he did not testify in his own behalf may be considered in evidence against him, and that they should give such fact such weight as it is entitled to when considered with the other evidence in the case, is proper.[101] But such an instruction is not proper unless it appears that the party thus failing to testify in his own behalf has knowledge of and could give material evidence as a witness.[102] So it is improper to charge that it is fair to infer that the testimony of a witness is untrue, from the failure to call another person as a witness who has knowledge of the same facts and who was accessible and able to appear.[103]

The omission of a party to call a witness who might have been called by the other party is no ground for a presumption that the testimony of the witness would have been unfavorable.[104]

Where a litigant produces and examines a witness on his side of the case, the fact that he fails to call the attention of the witness to certain material facts which the witness perhaps knows something about, will not warrant the inference that the testimony of the witness as to the facts omitted would have been unfavorable, nor authorize the giving of instructions submitting any such inference to the jury.[105] The fact that a particular person who is equally within the control of both parties, is not called as a witness, is no ground for any presumption against either party, and the jury have no right to presume anything in respect to his knowledge of any of the facts of the case.[106]

While it is true that a party who introduces a witness vouches for his truthfulness and will not be permitted to impeach him, yet he does not warrant the witness to be truthful; hence an

[101] Miller v. Dayton, 57 Iowa, 423, 10 N. W. 814; Blackwood v. Brown, 29 Mich. 483; Union Bank v. Stone, 50 Me. 595.

[102] Emery v. Smith, 54 Ga. 273.

[103] Brown v. Town of Swanton, 69 Vt. 53, 37 Atl. 280.

[104] Millman v. Rochester R. Co. 39 N. Y. S. 279; Cramer v. City of Burlington, 49 Iowa, 215.

[105] Millman v. Rochester R. Co. 39 N. Y. S. 274.

[106] Scovill v. Baldwin, 27 Conn. 316. See Flynn v. New York E. R. Co. 50 N. Y. S. 375.

instruction that when a party introduces a witness he thereby indorses his credibility is erroneous.[107]

§ 223. Singling out witnesses—Improper.—It is improper in the giving of instructions to single out a particular witness, by name or otherwise, and submit his testimony to the jury and thereby give it prominence.[108] Instructions relating to witnesses should apply equally to all of them and not single out and give prominence to the testimony of any particular witness.[109] It is also quite as improper to single out and give prominence to a certain class of witnesses, such as experts, and make comments on the testimony, either favorable or unfavorable. Such practice is an invasion of the province of the jury.[110]

An instruction as to the testimony of non-expert witnesses where the defense is insanity, stating that their opinions are to be received and weighed only in the light of the facts related by them; that the jury should judge of the reasonableness of their opinions from such facts, and give them such weight as they might deem proper, and that both the expert and non-expert

[107] Jarnigan v. Fleming, 43 Miss. 710; S. v. Brown, 76 N. Car. 225.

[108] S. v. Chick (Mo.), 48 S. W. 829; P. v. Clark, 105 Mich. 169, 62 N. W. 1117; Davidson v. Wallingford, 88 Tex. 619, 32 S. W. 1030; King v. S. 120 Ala. 329, 25 So. 178; Smith v. S. (Tex. Cr. App.), 49 S. W. 583; Thompson v. S. 106 Ala. 67, 17 So. 512; Donahue v. Egan, 85 Ill. App. 20; Southern R. Co. v. Reaves (Ala.), 29 So. 594; Grand Rapids & I. R. Co. v. Judson, 34 Mich. 507.

[109] Wells v. S. 131 Ala. 48, 31 So. 572; Winter v. S. 133 Ala. 176, 31 So. 717; P. v. Weissenberger, 77 N. Y. S. 71, 73 App. Div. 428 (accomplice); Graff v. P. 208 Ill. 326; Arnold v. Pucher, 83 Ill. App. 182; Doyle v. P. 147 Ill. 398, 35 N. E. 372; Argabright v. S. 49 Neb. 760, 69 N. W. 102; Chicago & A. R. Co. v. Winters, 175 Ill. 299, 51 N. E. 901 (held not singling out witnesses of one party); Rafferty v. P. 72 Ill. 37, 46; Orendorff v. Finfronch, 65 Ill. App. 174; Cogwell v. Southern P. R. Co. 129 N. Car. 398, 40 S. E. 202; Mathews v. Granger, 96 Ill. App. 536, 63 N. E. 658; S. v. Smith, 8 S. Dak. 547, 67 N. W. 619. See also Frost v. S. 124 Ala. 71, 27 So. 550; Clausen v. Jones, 18 Tex. Cv. App. 376, 45 S. W. 183; S. v. McClellan, 23 Mont. 532, 59 Pac. 924; Heddle v. City Elec. R. Co. 112 Mich. 547, 70 N. W. 1096; Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 22 So. 20. It has been held that where only one witness was impeached by showing that he had committed the crime of perjury, it was proper for the court in giving instructions to refer to such witness by name. Shaw v. S. 102 Ga. 660, 29 S. E. 477. See S. v. Jackson, 103 Iowa, 702, 73 N. W. 467.

[110] Hayden v. Frederickson, 59 Neb. 141, 80 N. W. 494; Coleman v. Adair, 75 Miss. 660, 23 So. 369; Blough v. Parry, 144 Ind. 463, 40 N. E. 70; Jamison v. Weld, 93 Me. 345, 45 Atl. 299; Thomas v. Gates, 126 Cal. 1, 58 Pac. 315; Smith v. Chicago & W. I. R. Co. 105 Ill. 511, 522; Brush v. Smith, 111 Iowa, 217, 82 N. W. 467. See Bever v. Spangler, 93 Iowa, 576, 61 N. W. 1072.

testimony should be subjected to a careful and painstaking investigation, properly states the law.[111] Where the evidence tends to prove that other witnesses besides the plaintiff who gave testimony, were interested in the result of the suit, an instruction singling out the plaintiff and applying to him alone the test of credibility because of his interest is improper.[112] So it is improper to instruct that if the jury believe a certain witness they should find for the defendant, when there is other evidence tending to contradict the testimony of such witness.[113] Where the testimony of a witness has been greatly weakened by his contradictory statements on former trials and by his apparently imperfect memory, it is improper for the court to charge that it is the duty of the jury to reconcile his testimony, if possible; that it is better to assume that a witness has made mistakes rather than that he has testified falsely. Such a charge invades the province of the jury.[114]

§ 224. **Detectives and informers as witnesses.**—The testimony of detectives and informers, whose business it is to secure evidence, should be examined and weighed with greater care than that of witnesses wholly disinterested, and it is proper to so instruct the jury.[115] That a reward has been offered for the apprehension of a person accused of the commission of a crime, is a fact proper to be shown in evidence as affecting the credibility of a witness who may have been instrumental in causing the arrest of the accused; hence it is improper to instruct the jury that "the mere fact that a reward had been offered is not evidence against the credibility of the witnesses; that there must be something in connection therewith to show that the

[111] Wilcox v. S. 94 Tenn. 106, 28 S. W. 312. But in the federal courts it has been held not improper for the court to state that the testimony of medical experts is entitled to great weight. St. Louis, Q. M. & S. R. Co. v. Phillips, 66 Fed. 35.

[112] City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 897; Pennsylvania Co. v. Versten 140 Ill. 637, 642, 30 N. E. 540; North Chicago St. R. Co. v. Dudgeon, 83 Ill. App. 528, 56 N. E. 796. See City of Spring Valley v. Gavin, 182 Ill. 232, 54 N. E. 1035.

[113] Fox v. Manhattan R. Co. 73 N. Y. S. 896, 67 App. Div. 460; Grand Rapids & I. R. Co. v. Judson, 34 Mich. 507.

[114] Isely v. Illinois Cent. R. Co. 88 Wis. 453, 60 N. W. 794.

[115] Sandage v. S. 61 Neb. 240, 85 N. W. 35; Fidelity M. L. Asso. v. Jeffords, 107 Fed. 402, 53 L. R. A. 193 note.

witness testified in view of the reward."[116] But calling the attention of the jury to the admitted fact that the witnesses for the state had been paid and hired to arrest the defendant is improper.[117]

§ 225. Relatives as witnesses.—In passing upon the credibility of the witnesses the jury may take into consideration the relationship of any of them to the defendant, if any is shown, and it is proper to so instruct the jury.[118] Thus an instruction that the jury should scrutinize the testimony of the defendant's father and mother on account of their relationship, and if they believe them to be credible, their testimony should be given as full weight as that of other witnesses, is proper.[119] An instruction that "in considering the weight of the testimony given by both the defendant and his wife, you will take into consideration the fact that he is the defendant testifying in his own behalf and that she is his wife, and you may consider their interest in the case and the marital relation in passing upon the credibility of their testimony," is proper.[120]

A charge that: "It is the duty of the jury, in passing upon the evidence of the prisoner himself, and of his near relatives who have testified for him, to scrutinize their evidence with great caution, considering their interest in the result of the verdict, and after so considering, the jury will give to it such weight as they may deem proper," is erroneous, in that it does not further charge that if the witnesses were found to be credible their testimony should be given full credit.[121] An instruction directing the attention to the testimony of the wife of the accused, stating that although the law does not say that a wife cannot swear to the truth, it does cast suspicion upon her

[116] Myers v. S. 97 Ga. 76, 25 S. E. 252.

[117] Copeland v. S. 36 Tex. Cr App. 575, 38 S. W. 210.

[118] Van Buren v. S. 63 Neb. 453, 88 N. W. 671. But see P. v. Shattuck, 100 Cal. 673, 42 Pac. 315, 22 L. R. A. 790. In a homicide case it has been held improper to call the attention of the jury to the relationship of the witnesses to the deceased as tending to discredit their testimony, Mitchell v. S. 133 Ala. 65, 32 So. 132.

[119] S. v. Apple, 121 N. Car. 584, 28 S. E. 469. See S. v. Byers, 100 N. Car. 512, 6 S. E. 420.

[120] S. v. Napper, 141 Mo. 401, 42 S. W. 957.

[121] S. v. McDowell, 129 N. Car. 523, 39 S. E. 840. See also S. v. Collins, 118 N. Car. 1203, 24 S. E. 118; S. v. Holloway, 117 N. Car. 730, 23 S. E. 168; S. v. Nash, 30 N. Car. 35.

testimony by reason of the close relationship between husband and wife, and that the jury should, therefore, scan it closely, is improper, as tending to lead the jury to believe that the testimony of the wife may be discredited, although they may believe that she has testified truthfully.[122] Also a charge that the jury have no right to reject the testimony of the wife and daughter of the accused simply because it comes from a source in which there would be strong motives to give the most favorable coloring possible to the evidence for the accused, is improper as expressing an opinion on the question of motives.[123]

The competency of children as witnesses depends upon their intelligence, judgment, understanding and ability to comprehend the nature and effect of an oath.[124] The jury are the judges of the credibility of a child witness, as well as all other witnesses, but it has been held not improper for the court to call their attention to the fact of the tender age of the witness when considering any contradictory or inconsistent statements in his testimony, if any, and advise them that they are not required to consider the testimony of such witness as they would that of a mature person. Thus, on a charge of having carnal knowledge of a female child, seven years old, an instruction that "you will not take and consider her statements if they are contradictory and inconsistent, as you would those of a mature person, but you must take them as the statements of a little girl, given under such circumstances as you have seen, and must weigh them in connection with all the other testimony," has been held not to be improper.[125] A charge that the jury "should weigh the testimony of an immature child with that degree of their own common knowledge and understanding of children in the narrative of events during childhood," is improper, in that it is incomplete and elliptical.[126]

§ 226. On competency and testimony of the defendant.—By

[122] S. v. Lee, 121 N. Car. 544, 28 S. E. 552.

[123] P. v. Pomeroy, 30 Ore. 16, 46 Pac. 797.

[124] Rapalje Witnesses § 7, citing Flanigan v. S. 25 Ark. 92; Warner v. S. 25 Ark. 447; P. v. Bernal, 10 Cal. 66; S. v. Dennis, 19 La. Ann. 119; S. v. Richie, 28 La. Ann. 327; S. v. Whitier, 21 Me. 341.

[125] Barnard v. S. 88 Wis. 656, 60 N. W. 1058.

[126] Walker v. S. 134 Ala. 86, 32 So. 703.

statutory provision the defendant in a criminal case is made a competent witness in his own behalf, at his election, and when he does testify he becomes the same in all respects as any other witness, and his testimony is to be tested by the same rules or tests that are applied to other witnesses.[127] And, of course, under such statute the defendant is entitled to have the jury instructed that he is a competent witness in his own behalf.[128] But the court may call special attention to the testimony of the defendant and tell the jury that they are authorized to take into consideration the interest he may have in the result of the trial, as affecting his credibility—in other words, the court may single out the testimony of the defendant which is improper as to other witnesses.[129] The court may instruct as to the credit to be given to the testimony of the accused, although there is no statute expressly authorizing it.[130] But this principle cannot be applied to any other witness who may be interested in the result of the trial or related to the defendant.[131]

§ 227. **Defendant's interest—Other considerations.**—As previously stated, the jury in weighing the testimony of the defendant in a criminal case shall be governed by the same rules and tests that are applied to the other witnesses, but the court may direct them that they should consider his interest in the result of the trial.[132] The court may also call the attention of the jury to the fact, if it be a fact, that the accused has been previously convicted of a felony.[133] Also that

[127] Sullivan v. P. 114 Ill. 24, 27, 28 N. E. 381; Rider v. P. 110 Ill. 13; Creed v. P. 81 Ill. 569.

[128] McVay v. S. (Miss.), 26 So. 947. See S. v. McClellan, 23 Mont. 532, 59 Pac. 924.

[129] Padfield v. P. 146 Ill. 663, 35 N. E. 469; Rhea v. U. S. 6 Okla. 249, 50 Pac. 992; Barmby v. Wolfe, 44 Neb. 77, 62 N. W. 318; Keating v. S. (Neb.), 93 N. W. 980; Ter. v. Gonzales (N. Mex.), 68 Pac. 925; Bressler v. P. 117 Ill. 422, 8 N. E. 62; Hirschman v. P. 101 Ill. 568; Doyle v. P. 147 Ill. 394, 35 N. E. 372; Dryman v. S. 102 Ala. 130, 15 So. 433; McIntosh v. S. 151 Ind. 251. See Underhill Cr. Ev. § 58.

[130] P. v. Hitchcock, 104 Cal. 482, 38 Pac. 198.

[131] P. v. Hertz, 105 Cal. 660, 39 Pac. 32; McEwen v. S. (Miss.), 16 So. 242. Contra: as to wife of defendant, S. v. Napper, 141 Mo. 401, 42 S. W. 957.

[132] S. v. Summar, 143 Mo. 220, 45 S. W. 254; S. v. Young, 104 Iowa, 730, 74 N. W. 693; S. v. Wiggins, 50 La. Ann. 330, 23 So. 334; Kirkham v. P. 170 Ill. 16, 48 N. E. 465; P. v. Petmecy, 99 N. Y. 421, 2 N. E. 145. See also Honsh v. S. 43 Neb. 163, 61 N. W. 571; Newport v. S. 140 Ind. 299, 39 N. E. 926; S. v. Case, 96 Iowa, 264, 65 N. W. 149; S. v. Metcalf, 17 Mont. 417, 43 Pac. 998; P. v. Calvin, 60 Mich. 114, 26 N. W. 851.

[133] P. v. Johnson, 104 Cal. 418, 38 Pac. 91. See Conkey v. Carpen-

if the jury find from the evidence that the defendant has made any false, improbable or contradictory statements in his testimony these matters are proper to be considered in weighing his testimony.[134] And it is also proper to charge that the defendant sustains or occupies a relation to the case different from that of any other witness where the instruction clearly states what his relation to the case is—that he is the defendant.[135] Although it is proper to thus caution the jury in weighing the testimony of the accused, yet the court should not cast suspicion upon it in giving instructions.[136]

An instruction stating that the jury are "to consider what he has at stake; consider the temptations brought to bear on a man in his situation to tell a falsehood," is improper.[137] An instruction which states that the jury, in weighing the testimony of the defendant, may consider the relationship of the witnesses to him, their interest in the event of the suit, their temper and feeling and their demeanor while testifying, is improper.[138] On the other hand, if the testimony of the accused is corroborated by other credible evidence the jury may consider it as strengthened to the extent of such corroboration.[139]

To instruct that the jury are not bound to believe the testimony of the defendant, nor treat it the same as the testimony of other witnesses, is improper and prejudicial.[140] But an instruction that "the testimony of the defendant is to be weighed

ter, 106 Mich. 1, 63 N. W. 990 (relating to any witness who has been convicted of a crime).

[134] Jones v. S. 61 Ark. 88, 32 S. W. 81; Com. v. Devaney, 182 Mass. 33, 64 N. E. 402; Sater v. S. 58 Ind. 378 (relating to the defendant procuring false testimony).

[135] P. v. Curry, 103 Cal. 548, 37 Pac. 503; P. v. Ferry, 84 Cal. 31, 24 Pac. 33; McIntosh v. S. 151 Ind. 251, 51 N. E. 354.

[136] S. v. White, 10 Wash. 611, 39 Pac. 160; Alexander v. S. 114 Ga. 266, 40 S. E. 231.

[137] P. v. Van Ewan, 111 Cal. 144, 43 Pac. 520.

[138] Eller v. P. 153 Ill. 344, 38 N. E. 660.

[139] Johnson v. U. S. 157 U. S. 320, 15 Sup. Ct. 164. An instruction that if the jury have a reasonable doubt as to the truth of the testimony of the defendant they must acquit him, is improper, where there is other evidence tending to prove his guilt, Naugher v. S. 116 Ala. 463, 23 So. 26. An instruction relating to an interview between the state's attorney and the defendant, stating that if the jury have any doubt as to what was said between them, where they, as witnesses, contradicted each other, then the jury should adopt the version of the defendant, is improper, S. v. Warner, 69 Vt. 30, 37 Atl. 246.

[140] Sullivan v. P. 114 Ill. 27, 28 N. E. 381; Chambers v. P. 105 Ill. 409, 412; Reagan v. U. S. 157 U. S. 310, 15 Sup. Ct. 610. See S. v. Mecum, 95 Iowa, 433, 64 N. W. 286; Gulliher v. P. 82 Ill. 146; Hellyer v. P. 186 Ill. 550, 58 N. E. 245. See Allen v. S. 87 Ala. 107, 6 So. 370.

by the same rules that govern in weighing the testimony of other witnesses, but in passing upon its weight the jury may consider the interest the defendant has in the result of the trial; but that they should not reject his testimony if they believe it to be true, simply because he is the defendant,'' is proper.[141] Or a charge that the defendant is a competent witness, but that the jury are the judges of the weight to be given to his testimony, and that they should take into consideration all the surrounding facts and circumstances and give his testimony such weight only as they believe it entitled to, in view of all the facts, is not improper.[142]

§ 228. **On defendant's unsworn statements.**—By statute in some of the states the accused is permitted to make an unsworn statement in his defense. Any such statement thus made is proper to go to the jury and to be allowed such weight as they may see fit to give it.[143] And it is proper for the court to call the attention of the jury to the fact that the statement of the accused is not made under oath.[144] It is also proper for the court to advise the jury to be extremely cautious in believing the unsworn statement of the accused.[145] But to say to the jury that the defendant's statement is ''not binding on them'' is improper.[146] And in charging the jury as to the statement of the accused, the better practice is to instruct in the language of the statute, although the court is authorized to instruct on the effect of such statute.[147] The failure of the court, however, to make any reference to the defendant's statement is not prejudicial error where the instructions in all other respects fully cover the questions involved.[148]

[141] S. v. Summar, 143 Mo. 220, 45 S. W. 254. See P. v. Holmes, 126 Cal. 462, 58 Pac. 917; S. v. Metcalf, 17 Mont. 417, 43 Pac. 182.

[142] McIntosh v. S. 151 Ind. 251, 51 N. E. 354; Smith v. S. 118 Ala. 117, 24 So. 55; Palmer v. S. (Neb.), 97 N. W. 235.

[143] Olive v. S. 34 Fla. 203, 15 So. 925; Blackburn v. S. 71 Ala. 319; P. v. Arnold, 40 Mich. 715; Smith v. S. 94 Ga. 591, 22 S. E. 214; Harrison v. S. 83 Ga. 129, 9 S. E. 542; Sledge v. S. 99 Ga. 684, 26 S. E. 756.

[144] Poppell v. S. 71 Ga. 276.

[145] Alexander v. S. 114 Ga. 266, 40 S. E. 231.

[146] Knight v. S. 114 Ga. 48, 39 S. E. 928.

[147] Strickland v. S. 115 Ga. 222, 41 S. E. 713; Pitts v. S. 114 Ga. 35, 39 S. E. 873. See also Hoxie v. S. 114 Ga. 19, 39 S. E. 944; Vaughn v. S. 88 Ga. 371, 16 S. E. 64; Tucker v. S. 114 Ga. 61, 39 S. E. 926; Lacewell v. S. 95 Ga. 346, 22 S. E. 546.

[148] Hayes v. S. 114 Ga. 25, 40 S. E. 13.

§ 229. **On defendant's failure to testify.**—The fact that the accused does not testify in his own behalf cannot be construed as a circumstance against him, and the court may so advise the jury by proper instructions.[149] And in some jurisdictions the court should instruct, if requested, that the fact that the defendant does not testify should not be considered or construed against him; that no presumption of guilt should be indulged against him because he has not testified in his own behalf. The refusal of an instruction properly embracing this principle is reversible error.[150] But in the absence of a request for such an instruction there can be no ground for complaint. The court is not bound to give an instruction on its own motion, that the failure of the defendant to testify in his own behalf should not be taken as a circumstance against him.[151]

[149] S. v. Johnson, 50 La. Ann. 154, 23 So. 199; P. v. Fitzgerald, 46 N. J. L. 1020; Guimo v. S. 39 Tex. Cr. App. 257, 45 S. W. 694; Ferguson v. S. 52 Neb. 432, 72 N. W. 590; P. v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; Grant v. S. (Tex. Cr. App.), 70 S. W. 954; P. v. Hoch, 150 N. Y. 291, 44 N. E. 976; S. v. Hogan, 115 Iowa, 455, 88 N. W. 1074; S. v. Weems, 96 Iowa, 426, 65 N. W. 387; Sullivan v. S. 9 Ohio C. C. 652; S. v. Krug, 12 Wash, 288, 41 Pac. 126; S. v. Robinson, 117 Mo. 649, 23 S. W. 1066. Contra: Prewitt v. S. 41 Tex. Cr. App. 262, 53 S. W. 879; Torey v. S. 41 Tex. Cr. App. 543, 56 S. W. 60.

[150] Farrell v. P. 133 Ill. 247, 24 N. E. 423; S. v. Evans, 9 Kas. App. 889; Shrawley v. S. 153 Ind. 375, 55 N. E. 95; S. v. Goff, 62 Kas. 104, 61 Pac. 683; S. v. Wines, 65 N. J. L. 31, 46 Atl. 702; S. v. Carnagy, 106 Iowa, 483, 76 N. W. 805; S. v. Landry, 85 Me. 95, 26 Atl. 998; S. v. Carr, 25 La. Ann. 408; P. v. Rose, 52 Hun (N. Y.), 33.

[151] Metz v. S. 46 Neb. 547, 65 N. W. 190; Matthews v. P. 6 Colo. App. 456, 41 Pac. 839; Grubb v. S. 117 Ind. 277, 20 N. E. 257; S. v. Magers, 36 Ore. 38, 58 Pac. 892; Foxwell v. S. 63 Ind. 539; P. v. Flym, 73 Cal. 511, 15 P. 102; Felton v. S. 139 Ind. 531, 39 N. E. 228.

CHAPTER XI.

SPECIAL FINDINGS.

Sec.
230. Questions for special findings are proper.
231. Interrogatories should relate to ultimate facts.
232. General instructions unnecessary and improper.
233. Interrogatories illustrating practice.
234. General and special verdicts.

§ 230. Questions for special findings are proper.—The submission of questions of fact for the determination of the jury by special finding is proper as a preliminary step to the submission of the entire case or for directing a verdict.[1] Issues are sometimes presented by the pleadings, which should be submitted to the jury for separate finding, as, for instance, a plea of venue.[2] But whether questions of fact for special findings should be submitted to the jury is a matter largely within the discretion of the trial court.[3] The practice is usually regulated by statute, but in substance it is merely the submission to the jury of special interrogatories for answers.[4]

§ 231. Interrogatories should relate to ultimate facts.—When special interrogatories are thus submitted they should relate to the ultimate facts in issue; that is, the answers to the inter-

[1] City of Elizabeth v. Fitzgerald, 114 Fed. 547.

[2] Merchants & Planters' Oil Co. v. Burrow (Tex. Cv. App.), 69 S. W. 435.

[3] Chicago, St. P. M. & O. R. Co. v. Lagerkrans (Neb.), 91 N. W. 358; City of Crete v. Hendricks (Neb.), 90 N. W. 215; Kane v. Footh, 70 Ill. 590. But see Gale v. Priddy, 66 Ohio St. 400, 64 N. E. 437; Morrison v. Northern P. R. Co. (Wash.), 74 Pac. 1066, action of the trial court not reviewable.

[4] See Woodmen, &c. v. Locklin, 28 Tex. Cv. App. 486, 67 S. W. 331.

rogatories must be conclusive of the rights of the parties.[5] A question for special finding should be single and direct, and relate to an ultimate and controlling fact in the case, and not to evidentiary facts from which the ultimate fact may be deduced by reasoning or argument.[6] Several questions should not be submitted in one instruction in charging as to special verdict.[7]

§ 232. General instructions unnecessary and improper.—Instructions submitting to the jury general propositions of law are unnecessary and improper where special findings are requested.[8] After the jury determine the facts by special findings the court applies the law.[9] Where there is a request for a special verdict the court should instruct as to the nature of the action, the issue, and as to the form of the verdict, but general instructions as to the law of the case are improper.[10]

Under the procedure of North Carolina the jury do not render a general verdict, but merely respond to the issues submitted for determination. An instruction, therefore, which charges that, on a certain showing of the facts, the plaintiff cannot recover, is properly refused.[11] It is improper for the court to state to the jury the legal effect of their answers to questions pre-

[5] Taylor v. Felsing, 164 Ill. 331, 339, 45 N. E. 161. See Judy v. Sterrett, 153 Ill. 94, 98, 38 N. E. 633; Terre Haute & I. R. Co. v. Eggman, 159 Ill. 550, 42 N. E. 970; Kletzing v. Armstrong, 119 Iowa, 505, 93 N. W. 500; Gutzman v. Clancy, 114 Wis. 509, 90 N. W. 1081; Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; Gale v. Priddy, 66 Ohio St. 400, 64 N. E. 437; Cullen v. Hanisch, 114 Wis. 24, 89 N. W. 900; Nix v. Reiss Coal Co. 114 Wis. 493, 90 N. W. 437; Palnode v. Westenhaver, 114 Wis. 460, 90 N. W. 467.

[6] Illinois Steel Co. v. Mann, 197 Ill. 186, 64 N. E. 328, citing L. Wolff Mfg. Co. v. Wilson, 152 Ill. 9, 38 N. E. 694.

[7] Cullen v. Hanisch, 114 Wis. 24, 89 N. W. 900.

[8] Rhyner v. City of Menasha, 107 Wis. 201, 83 N. W. 303; Kohler v. West Side R. Co. 99 Wis. 33, 74 N. W. 568; Seibrecht v. Hogan, 99 Wis. 437, 75 N. W. 71; Klatt v. N. C. Foster Lumber Co. 97 Wis. 641, 73 N. W. 563; Goesel v. Davis, 100 Wis. 678, 76 N. W. 768; Manch v. City of Hartford, 112 Wis. 40, 87 N. W. 816; Ward v. Cochran, 71 Fed. 128. See Reed v. City of Madison, 85 Wis. 667, 56 N. W. 182.

[9] Johnson v. Culver, 116 Ind. 278, 19 N. E. 129.

[10] Stayner v. Joyce, 120 Ind. 99, 22 N. E. 89; Woolen v. Wire, 100 Ind. 251; Indianapolis, P. & C. R. Co. v. Bush, 101 Ind. 587; Boyce v. Schreoder, 21 Ind. App. 28, 51 N. E. 376; Udell v. Citizens' St. R. Co. 152 Ind. 507, 52 N. E. 799; Louisville, N. A. & C. R. Co. v. Buck, 116 Ind. 566, 19 N. E. 453. See Louisville, N. A. & C. R. Co. v. Lynch, 147 Ind. 165, 44 N. E. 997, 34 L. R. A. 293; Louisville, N. A. & C. R. Co. v. Frawley, 110 Ind. 28, 9 N. E. 594.

[11] Witsell v. West Asheville & S. S. R. Co. 120 N. Car. 537, 27 S. E. 125, 35 L. R. A. 808 note.

sented to them.[12] The court should not state to the jury that if they answer "yes" to a certain interrogatory, a general verdict for the plaintiff could not be sustained.[13]

§ 233. Interrogatories illustrating practice.—The following interrogatories were held properly submitted to the jury for answers and serve to illustrate the rule: If defendant's tenancy did not expire March thirty-first, when did it expire by his agreement with the plaintiff?

If the plaintiff agreed to let the defendant have the premises longer than the end of March, when and how did they make the agreement?

These questions do not ask for the statements of evidence, but material facts.[14] In an action for causing the death of a person by negligence the following interrogatory, to wit: "Was the defendant passing over the crossing in the usual way and going directly across the same?" was held properly refused, because not relating to an ultimate fact in issue.[15]

In another case, the court submitted to the jury this question: Was the note (of five thousand dollars) given as an inducement to procure the marriage of the plaintiff to the defendant, or not, and if not, for what was it given?

Answer: "It was not given as an inducement to procure the marriage of the plaintiff, but only as a bridal present, and had no consideration, and was null and void."

It was not necessary for the jury to state for what the note was given; but the fact that they found for what it was given necessarily means that they found it was not given in consideration of marriage.[16] Interrogatories submitted for the purpose of having the jury state upon which paragraph or paragraphs of the complaint a verdict is based is not warranted under the statutes of Indiana, as not asking for an ultimate fact.[17]

§ 234. General and special verdicts.—To enable a party to

[12] Gerrard v. La Crosse City R. Co. 113 Wis. 258, 89 N. W. 125.

[13] Coats v. Town of Stanton, 90 Wis. 130, 62 N. W. 619.

[14] Lantmann v. Miller, 158 Ind. 382, 63 N. E. 761. See Wabash R. Co. v. Schultz, 30 Ind. App. 495, 64 N. E. 481.

[15] Terre Haute & I. R. Co. v. Eggman, 159 Ill. 550, 42 N. E. 970.

[16] Hatchett v. Hatchett, 28 Tex. Cv. App. 33, 67 S. W. 163.

[17] Consolidated Stone Co. v. Morgan, 160 Ind. 241, 66 N. E. 696.

successfully interpose the special findings of the jury upon particular questions of fact as a reason for judgment in his favor, he must at least have special findings that stand in such clear antagonism to the general verdict that the two cannot coexist.[18] The special finding must control where there is an irreconcilable conflict between it and the general verdict.[19] Where answers to interrogatories are inconsistent, contradictory and at war with each other, they simply work destruction among themselves, and do not impair the general verdict.[20]

An instruction that the answers to particular questions submitted to the jury must be consistent with each other and with the general verdict is improper.[21] But to say that "it is very important that the questions you are asked to answer should be answered so that they will correspond with your verdict" is not improper, and is not a direction to the jury that their answers to the special questions must correspond with their general verdict.[22] In passing on a motion for judgment on special findings, notwithstanding the general verdict to the contrary, it should be borne in mind that the verdict necessarily covers the whole issue, and that it solves every material fact against the party against whom it is rendered.[23]

[18] McCoy v. Kokomo R. & L. Co. 158 Ind. 658, 64 N. E. 92; City of Mishawaka v. Kirby (Ind.), 69 N. E. 482. See Union Tr. Co. v. Vandercook (Ind.), 69 N. E. 487.

[19] Bedford Q. Co. v. Thomas, 29 Ind. App. 85, 63 N. E. 880; Roe v. Winston, 86 Minn. 77, 90 N. W. 122.

[20] McCoy v. Kokomo, R. & L. Co. 158 Ind. 658, 64 N. E. 92; Rice v. Manford, 110 Ind. 596, 11 N. E. 283; Redelsheimer v. Miller, 107 Ind. 485, 8 N. E. 447. See Brems v. Sherman, 158 Ind. 300, 63 N. E. 571.

[21] Coffeyville Brick Co. v. Zimmerman, 61 Kas. 750, 60 Pac. 1064; Kilpatrick Koch Dry Goods Co. v. Kahn, 53 Kas. 274, 36 Pac. 327; Mechanics' Bank v. Barnes, 86 Mich. 632, 49 N. W. 475. See St. Louis & S. F. R. Co. v. Burrows, 62 Kas. 89, 61 Pac. 439. But see Hoppe v. Chicago, M. & St. P. R. Co. 61 Wis. 357, 21 N. E. 227.

[22] Germaine v. City of Muskegon, 105 Mich. 213, 63 N. W. 78. See Redford v. Spokane St. R. Co. 9 Wash. 55.

[23] McCoy v. Kokomo, R. & L. Co. 158 Ind. 658, 64 N. E. 92 (citing Indiana case).

CHAPTER XII.

ERRORS.

Sec.
235. Immaterial error—Generally.
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240. In criminal cases—Error cured by others.
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247. Instructions contradictory.
248. Instructions differing widely from each other.
249. Instructions self-contradictory.
250. Evidence close, conflicting or doubtful.

§ 235. **Immaterial error—Generally.**—It is the duty of the court to harmonize the instructions so that they will present to the jury the legal questions in a plain, consistent and intelligible manner; but the giving of an erroneous instruction is not ground for reversal where it appears from an examination of the charge as a whole that the erroneous instruction did no harm to the party complaining.[1] The mere fact that an instruction is erroneous will not of itself be regarded as reversible error where it is apparent that it could not have been misleading when taken in connection with other instructions given.[2]

[1] Chicago, R. I. & P. R. Co. v. Krapp, 173 Ill. 219, 50 N. E. 663; City of Decatur v. Besten, 169 Ill. 340, 48 N. E. 186; Copeland v. Hewett, 96 Me. 525 53 Atl. 36.

[2] Slingloff v. Bruner, 174 Ill. 570, 51 N. E. 772; Seigel, Cooper & Co. v. Connor, 171 Ill. 572, 49 N. E. 728; Illinois Cent. R. Co. v. Ashline, 171 Ill. 320, 49 N. E. 521; Chicago

§ 236. Verdict showing error disregarded.—The giving of an improper instruction will be regarded as merely harmless error where it appears from the verdict to have been disregarded by the jury.[3] Or an error committed in refusing a proper instruction is harmless where it appears from the verdict that it would have had no effect had it been given.[4] Thus, where it appears from answers to interrogatories, that the jury disregarded an error in the charge, the error is not prejudicial.[5] Although an instruction may properly submit a material fact for determination, yet the refusal to give it is but harmless error where the jury, in answer to special interrogatories, have found against the party requesting the instruction as to such fact.[6] Also where the special findings of the jury show the plaintiff to have been wholly free from negligence, an error com-

& A. R. Co. v. Anderson, 166 Ill. 572, 46 N. E. 1125; Keating v. P. 160 Ill. 483, 43 N. E. 724; Porter v. P. 158 Ill. 370, 41 N. E. 886; Pope v. Pope, 95 Ga. 87, 22 S. E. 245; Spies v. P. 122 Ill. 245, 12 N. E. 865, 17 N. E. 898; Liberty Ins. Co. v. Ehrlich, 42 Neb. 553, 60 N. W. 940; Chicago & A. R. Co. v. Matthews, 153 Ill. 268, 38 N. E. 559; Wenona Coal Co. v. Holmquest, 152 Ill. 591, 38 N. E. 946; Rich v. City of Chicago, 152 Ill. 30, 38 N. E. 255; Lake E. & W. R. Co. v. Wills, 140 Ill. 614, 31 N. E. 122; City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748; Consolidated Coal Co. v. Bokamp, 181 Ill. 16, 54 N. E. 567; Keeler v. Herr, 157 Ill. 57, 41 N. E. 750; South C. C. R. Co. v. Dufresne, 200 Ill. 456, 65 N. E. 1075; Van Buskirk v. Day, 32 Ill. 266. See generally: Com'rs v. Ryckman, 91 Md. 36, 46 Atl. 311; Ohio & M. R. Co. v. Stein, 140 Ind. 61, 39 N. E. 246.

[3] St. Louis, I. M. & S. R. Co. v. Baker, 67 Ark. 531, 55 S. W. 941; Smith v. Rountree, 185 Ill. 219, 56 N. E. 1139; Brush v. Smith, 111 Iowa, 217, 82 N. W. 467; Gallimore v. Brewer, 22 Ky. L. R. 296, 57 S. W. 253; Gulf, C. & S. F. R. Co. v. Condor, 23 Tex. Cv. App., 488, 58 S. W. 58; Atchison, T. & S. F. R. Co. v. Cuniffe (Tex. Cv. App.), 57 S. W. 692; Murphy v. St. Louis Tr. Co. 96 Mo. App. 272, 70 S. W. 159 (verdict rendered less than the demand); National Horse Importing Co. v. Novak, 95 Iowa, 596, 64 N. W. 616 (no general damages awarded); White v. Bryan, 96 Iowa, 166, 64 N. W. 765; Westbrook v. S. 97 Ga. 189, 22 S. E. 398; S. v. Afray, 124 Mo. 393, 27 S. W. 1097. See also Ash v. Beck (Tex. Cv. App.), 68 S. W. 53; International Soc. v. Hildreth, 11 N. Dak. 262, 91 N. W. 70; Sunset T. & T. Co. v. Day, 70 Fed. 364; Clarkson v. Whitaker (Tex. Cv. App.), 33 S. W. 1032; Vickers v. Kennedy (Tex. Cv. App.), 34 S. W. 458; Godfrey v. Phillips, 209 Ill. 584, 594.

[4] Thompson v. S. (Tex. Cr. App.), 30 S. W. 667; Town of West Covington v. Schultz, 16 Ky. L. R. 831, 30 S. W. 410.

[5] Rouse v. Harry, 55 Kas. 589, 40 Pac. 1007; Pennsylvania Coal Co. v. Kelly, 150 Ill. 9, 40 N. E. 938; Mason v. Sieglitz 22 Colo. 320, 44 Pac. 588.

[6] National L. M. Ins. Co. v. Whitacre (Ind. App.), 43 N. E. 905. See East St. L. C. Co. v. O'Harra, 150 Ill. 585, 37 N. E. 917; Indianapolis St. R. Co. v. Hockett, 159 Ind. 682, 66 N. E. 39.

mitted in charging the jury on the old doctrine of comparative negligence which is no longer in force, is harmless.[7]

§ 237. The principles illustrated.—A charge which states the amount sued for to be too high and the verdict returned is for the proper amount claimed, the error is immaterial and harmless.[8] Where the verdict of the jury exempts a party from liability, the giving of an erroneous instruction limiting his liability is harmless.[9] So where the jury find that the defendant was not guilty of negligence, that renders the question of contributory negligence immaterial, and hence the giving of an erroneous instruction as to contributory negligence is not ground for error.[10] Where the verdict is for the defendant in an action on a contract, an erroneous instruction as to the measure of damages stating that the plaintiff would be entitled to some damages if the contract was as he claimed it to be, is but harmless error.[11]

§ 238. Imperfect instruction corrected by others.—An instruction, though erroneous when standing alone, is not to be regarded as misleading where the matter upon which it touches is fully and properly stated in another instruction;[12] or if an instruction is defective in any particular, yet when taken together with others given relating to the same subject such defect, is cured the error is harmless.[13] An imperfection in an

[7] Pennsylvania Coal Co. v. Kelly, 156 Ill. 9, 40 N. E. 938.

[8] Doe v. United States (Neb.), 91 N. W. 519.

[9] Shaefer v. St. Louis & S. R. Co. 128 Mo. 64, 30 S. W. 331. See Guerold v. Holtz, 103 Mich. 118, 61 N. W. 278.

[10] Scheel v. City of Detroit, 130 Mich. 51, 90 N. W. 274.

[11] Mobley v. Charlotte, C. & A. R. Co. 42 S. Car. 306, 20 S. E. 83; Lomax v. Holbine (Neb.), 90 N. W. 1122.

[12] Boldenwick v. Cahill, 187 Ill. 218, 58 N. E. 351; McMahan v. Sankey, 133 Ill. 636, 24 N. E. 1027; Langdon v. P. 133 Ill. 282, 403, 24 N. E. 874; City of Joliet v. Johnson, 177 Ill. 178, 52 N. E. 498; Baltimore & O. S. W. R. Co. v. Spaulding, 21 Ind. App. 323, 52 N. E. 410; Rosenheimer v. Standard Gaslight Co. 53 N. Y. S. 192, 36 App. Div. 1; Indianapolis St. R. Co. v. Hockett, 159 Ind. 679, 66 N. E. 39; Town of Vinegar Hill v. Busson, 42 Ill. 45; P. v. Flannelly, 128 Cal. 83, 60 Pac. 670, Crane Co. v. Columbus S. Bank (Neb.), 91 N. W. 532; Pence v. Wabash R. Co. 116 Iowa, 279, 90 N. W. 59; Choctaw, O. & G. R. Co. v. Tennessee, 116 Fed. 23; Barnesville Mfg. Co. v. Love (Del.), 52 Atl. 267; Oliver v. Sterling, 20 Ohio St. 400; Jacoby v. Stark, 205 Ill. 34, 68 N. E. 557; City of Macon v. Holcomb, 205 Ill. 645, 69 N. E. 79; Keady v. P. (Colo.), 74 Pac. 895; Johnson v. Gebhauer, 159 Ind. 284, 64 N. E. 855.

[13] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 556, 51 N. E.

instruction is harmless when the instructions taken as a whole correctly state the law.[14] Although an instruction may be incorrect or misleading when severed from its connection with other instructions, by omitting some needed qualifications, yet

572; Chicago, R. I. & P. R. Co. v. Krapp, 173 Ill. 219, 50 N. E. 663, Chicago Trust Co. v. Goldsmith, 173 Ill. 326, 50 N. E. 676; Peoples' C. & A. Co. v. Darrow, 172 Ill. 62, 49 N. E. 1005; City of Lanark v. Dougherty, 153 Ill. 163, 38 N. E. 892; Central R. Co. v. Serfass, 153 Ill. 379, 39 N. E. 119; St. Louis B. Co. v. Miller, 138 Ill. 475, 28 N. E. 1091; City of Chicago v. McDonough, 112 Ill. 85; Westra v. Westra Estate, 101 Mich. 526, 60 N. W. 55; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 63 N. E. 778; Donk Bros. Coal & C. Co. v. Stroff, 200 Ill. 483, 66 N. E. 29; Redhing v. Central R. Co. 68 N. J. L. 641, 54 Atl. 431 (error cured by context). Error cured when instruction assumes fact: Texas & N. O. R. Co. v. Scott, 30 Tex. Cv. App. 496, 71 S. W. 26; Gulf, C. & S. F. R. Co. v. Carter (Tex. Cv. App.), 71 S. W. 73 (assuming plaintiff was a passenger). See Keating v. P. 160 Ill. 483, 43 N. E. 724; Hix v. P. 157 Ill. 383, 41 N. E. 862; Carlton v. S. 43 Neb. 373, 61 N. W. 699; Omaha Fair & E. A. v. Missouri P. R. Co. 45 Neb. 105, 60 N. W. 330; P. v. Neary, 104 Cal. 373, 37 Pac. 943; Chicago & A. R. Co. v. City of Pontiac, 169 Ill. 155, 171; West Ch. St. S. R. Co. v. Scanlan, 168 Ill. 34, 48 N. E. 149; Buck v. Maddock, 167 Ill. 219, 225, 47 N. E. 208; Day v. Porter, 161 Ill. 235, 43 N. E. 1073; City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748; St. Louis, A. & T. H. R. Co. v. Odurn, 156 Ill. 78, 40 N. E. 559; Milling v. Hillenbrand, 156 Ill. 310, 40 N. E. 941; North C. St. R. Co. v. Boyd, 156 Ill. 416, 40 N. E. 955; Cannon v. Farmers' Bank (Neb.), 91 N. W. 585; Cleveland, C. C. & St. L. R. Co. v. Baddeley, 150 Ill. 328, 36 N. E. 965; Johnson v. Johnson, 187 Ill. 97, 58 N. E. 237; Dueber Watch C. Mfg. Co. v. Young, 155 Ill. 226, 40 N. E. 582; Ide v. Fratcher, 194 Ill. 552, 62 N. E. 814; Hardware & Iron Co. v. O'Brien (Ind. App.), 62 N. W. 464; Mueller v. Pels, 192 Ill. 76, 61 N. E. 472; Boyd v. Portland Elec. Co. 40 Ore. 126, 66 Pac. 576; Galveston, H. & S. R. Co. v. Newport, 26 Tex. Cv. App. 583, 65 S. W. 657; Whitney & S. Co. v. O'Rourke, 172 Ill. 183, 50 N. E. 242; Kenyon v. City of Mondovi, 98 Wis. 50, 73 N. W. 314; Lambeth R. Co. v. Brigham, 170 Mass. 518, 49 N. E. 1022; Gilchrist v. Gilchrist, 76 Ill. 218; Zimmerman v. Brannon, 163 Iowa, 144, 72 N. W. 439; Lamb v. Missouri Pac. R. Co. 147 Mo. 171, 48 S. W. 659; McIntosh v. S. 151 Ind. 251, 51 N. E. 354; McVey v. S. 57 Neb. 471, 77 N. W. 1111; S. v. Heacock, 106 Iowa, 191, 76 N. W. 654; Hutchins v. S. 151 Ind. 667, 52 N. E. 403; Yundt v. Hartrunft, 41 Ill. 13; Meyers v. S. (Tex. Cr. App), 49 S. W. 600. See North C. St. R. Co. v. Peuser, 190 Ill. 73 (exception to the rule), 60 N. E. 78; Latham v. Roache, 72 Ill. 182; Chandler v. Com. 19 Ky. L. R. 631, 41 S. W. 437; De Weese v. Merimee I. M. Co. 128 Mo. 423, 31 S. W. 110; S. v. Steffens, 116 Iowa, 227, 89 N. W. 974; Clear Creek Stone Co. v. Dearmin, 160 Ind. 162, 66 N. E. 609; Aspy v. Batkins, 160 Ind. 170, 66 N. E. 462; Galveston, H. & S. A. R. Co. v. Bowman (Tex. Cv. App.), 25 S. W. 140, an instruction that a railroad company could not charge more than the local rate for freight, instead of agreed rate, is not error where the local and agreed rate are the same.

[14] Maynard v. Sigman (Neb.), 91 N. W. 576; Olson v. Oregon S. L. R. Co. 24 Utah, 460, 68 Pac. 148; Ill. C. R. Co. v. Hopkins, 200 Ill. 122, 65 N. E. 656; Arbuckle v. S. 80 Miss. 15, 31 So. 437; Jinks v. S. 114 Ga. 430, 40 S. E. 320.

when read in connection with the others the imperfection may be cured. If the instructions taken as a whole present the law with substantial accuracy that is sufficient.[15]

A general instruction which states the law correctly will not cure an error in a specific instruction, although the instructions must be considered together and as a whole.[16] But if any material element or fact be omitted in an instruction, the error is cured where such element or fact is stated in another instruction.[17] Thus, for instance, an instruction, though defective in that it fails to submit to the jury the question whether or not the plaintiff was in the exercise of ordinary care when injured, is but harmless error where other instructions given for either or both parties clearly submit the question thus omitted.[18]

§ 239. Error cured by opponent's instructions.—An error committed in the giving of a defective instruction for one of the parties may be cured by the giving of a proper instruction for the other party. For instance, an instruction which is defective in not instructing as to the proper measure of damages, in case

[15] Toluca M. & N. R. Co. v. Haws, 194 Ill. 92, 62 N. E. 312; Kunst v. Ringold, 116 Mich. 88, 74 N. W. 294; Liese v. Meyer, 143 Mo. 547, 45 S. W. 282.

[16] Clark v. S. 159 Ind. 66, 64 N. E. 589.

[17] Hacker v. Monroe & S. 176 Ill. 390, 52 N. E. 12; Tomle v. Hampton, 129 Ill. 384, 21 N. E. 800; Springfield C. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884; La Plant v. S. 152 Ind. 80, 52 N. E. 1452; Hamilton v. Love, 152 Ind. 641, 53 N. E. 181; Gordon v. Burris, 153 Mo. 223, 54 S. W. 546; Johnson v. Gebhauer, 159 Ind. 283, 64 N. E. 855; Harness v. Steele, 159 Ind. 293, 64 N. E. 875; S. v. Martin (Mont.), 74 Pac. 728; Chicago & E. I. R. Co. v. Clapp, 201 Ill. 434, 66 N. E. 223; Springfield C. R. Co. v. Puntenney, 200 Ill. 12; 65 N. E. 442; McMillen v. Lee, 78 Ill. 443; Orr v. Cedar R. & M. R. Co. 94 Iowa, 423, 62 N. W. 851; P. v. Klee (Cal.), 69 Pac. 696 ("wilfully" supplied by "intentionally"); Johnson v. Gehbauer, 159 Ind. 271, 64 N. E. 855; Cnicago C. R. Co. v. Finnemore, 199 Ill. 1, 64 N. E. 985 (ordinary care); S. v. Cottrill, 52 W. Va. 363, 43 S. E. 244; S. v. Prater, 52 W. Va. 132, 43 S. E. 230; Johnson v. Glidden, 11 S. Dak. 237, 76 N. W. 933; Graves v. Hillyer (Tex. Cv. App.), 48 S. W. 889; S. v. Prater, 52 W. Va. 132, 43 S. E. 230; S. v. Cottrill, 52 W. Va. 363, 43 S. E. 244.

[18] Willard v. Swansen, 126 Ill. 384, 18 N. E. 548; Chicago & A. R. Co. v. Johnson, 116 Ill. 210, 4 N. E. 381; Cherokee Packet Co. v. Hilson, 95 Tenn. 1, 31 S. W. 737; Waller v. Missouri, K., & T. R. Co. 59 Mo. App. 410; Hughes v. Chicago & A. R. Co. 127 Mo. 447, 30 S. W. 127; St. Louis, A. & T. H. R. Co. v. Odum, 156 Ill. 78, 40 N. E. 559.

An improper remark inadvertently made by the court in charging the jury cannot be said to be material error if it is retracted by the court unless it appears that the jury did not accept the retraction, Brooks v. Rochester, 31 N. Y. 179, 10 Misc. 88.

the jury should find for the plaintiff, is harmless error where the instructions given for the defendant fully and fairly state the rule for estimating damages.[19] So if an instruction is defective in that it fails to state that the burden is on the plaintiff to make out his case by a preponderance of the evidence, then one given for the defendant, correctly stating the law as to the burden of proof, will cure the error in the plaintiff's instruction.[20]

The giving of an instruction which may perhaps be too general on the question of negligence is only harmless error where other instructions given at the request of the opposing party properly confine the jury to the negligence alleged.[21] Also where an instruction incorrectly states the rule as to contributory negligence it is harmless error, where another instruction given at the request of either party states the rule correctly.[22] Also an instruction which improperly states the law as to the safety of the machinery or appliances furnished by the master to his servant in his work by permitting the jury to consider whether there were safer means at hand than that causing the injury, is not material error where another instruction properly announces the rule that the defendant is not required to procure the most improved appliances, but was required to use reasonably safe means only.[23]

In an action on a contract, an error in the giving of an instruction which in substance states that if the defendant has shown that there was a warranty which was broken, and that the machine was worthless, the money paid on account might be recovered, is cured where another instruction charges that the correct rule is the difference between the value of the machine, if it was perfect when delivered, and its present value.[24] Also in a suit on a building contract, a charge that if the jury believe that the plaintiff delivered the materials called for in

[19] Behm v. Parker (Md.), 32 Atl. 199, Springfield Coal Co. v. Puntenney, 200 Ill. 9, 65 N. E. 442.

[20] Mitchell v. Hindman, 150 Ill. 538, 37 N. E. 916; Central R. Co. v. Barmister, 195 Ill. 50, 62 N. E. 864.

[21] Johnson v. St. Louis & S. R. Co. 173 Mo. 307, 73 S. W. 173; Buckman v. Missouri, K. & T. R. Co. 100 Mo. App. 30, 73, S. W. 270.

[22] Cameron v. Union Trunk Line, 10 Wash. 507, 39 Pac. 128; Chocktow O. & G. R. Co. v. Tenn. 116 Fed. 23.

[23] Whaley v. Bartlett, 42 S. Car. 454, 20 S. E. 745.

[24] J. R. Alsing Co. v. New Eng. Q. & S. Co. 73 N. Y. S. 347, 66 App. Div. 473.

the detail plans last approved by the architect, within ninety days from the said approval, and erected the same in place of the said building within ninety days after the delivery thereof, and had "substantially" completed the erection of all the structural steel and iron work in said building within said last mentioned ninety days then they are entitled to recover, though erroneous, the error was cured by another instruction given at the request of the defendant, which states that the contract requires that the plaintiffs were bound "to furnish and complete the same and every part and detail thereof within ninety days" before they could recover.[25]

§ 240. In criminal cases—Error cured by others.—In a criminal case the omission of any material element, such, for instance, as the element of reasonable doubt, the error will be regarded as cured when another instruction given clearly defines the term.[26] Also where the court erroneously charges that proof of the ownership of property alleged to have been stolen, must be established by a "preponderance of the evidence," the error is cured by a general charge that the defendant must be acquitted, unless proved guilty beyond a reasonable doubt.[27]

The omission of the words "with premeditated malice" is not material error where the phrase is properly stated in another instruction which was given.[28] The omission of the word "feloniously" in a charge describing murder is not prejudicial error where the evidence for the prosecution shows that the defendant was lying in wait for his victim, the only defense being self-defense.[29] And if an instruction for the prosecution in a criminal case is calculated to mislead when standing alone, the error will be cured if the court fully instructs the jury on the

[25] Bailey v. Trustees, 200 Pa. St. 406, 50 Atl. 160.

[26] Poteet v. S. (Tex. Cr. App.), 43 S. W. 339; S. v. Wright, 141 Mo. 333, 42 S. W. 934; S. v. Cochran, 147 Mo. 504, 49 S. W. 558; Skeen v. S. (Miss.), 16 So. 495; Barnard v. S. 88 Wis. 656, 60 N. W. 1058; S. v. Hunt, 141 Mo. 626, 43 S. W. 389; P. v. Britton, 118 Cal. 409, 50 Pac. 664. See, also, Shields v. S. 104 Ala. 35, 16 So. 85, 5 Am. St. 17; Jackson v. S. 106 Ala. 12, 17 So. 333; Bonner v. Com. (Ky.), 38 S. W. 488; P. v. Scott, 123 Cal. 434, 56 Pac. 102.

[27] S. v. Goforth, 136 Mo. 111, 37 S. W. 801; Shields v. S. 149 Ind. 395, 49 N. E. 351. Contra: S. v. Clark, 102 Iowa, 685, 72 N. W. 296.

[28] Whitney v. S. 154 Ind. 573, 57 N. E. 398; White v. S. 34 Tex. Cr. App. 153, 29 S. W. 1094.

[29] Brooks v. Com. 16 Ky. 356, 28 S. W. 148.

same subject, in the instructions given for the defendant.[30] Thus, under an indictment for embezzlement, a charge that "you are instructed that the defendant being the cashier of the bank, and having control of the cash and other assets of said bank, is responsible therefor; and the fact that other officers of the bank have access to the funds does not relieve the defendant from accounting for the same," though erroneous, is cured where the court also charged that before the jury could convict they must find beyond a reasonable doubt that he actually converted the money of said bank to his own use.[31]

§ 241. **Damages—Defective instruction cured.**—An instruction though faulty in not limiting the damages claimed to the amount complained of in the declaration, will be regarded as cured where other instructions given for the defendant properly confine such damages to the declaration.[32] Even though an instruction improperly allows damages for prospective suffering and loss of health in a personal injury case where the declaration fails to make claim for a permanent injury, such instruction, though erroneous, is harmless where the evidence of the plaintiff's injuries, up to the time of the commencement of the suit, seems to justify the damages awarded, without reference to any prospective suffering or loss of health.[33]

Where it appears from an inspection of the whole case that the jury in assessing damages disregarded instructions which were defective in not confining them to the evidence, there can be no ground for error, the amount allowed being reasonable as appears from the evidence.[34] An instruction, though defective in directing the jury, in determining the value of property, "to consider the evidence of all the witnesses" is cured where another instruction expressly directs them to disregard any evidence which has been stricken out.[35]

§ 242. **Instructing assuming fact—Harmless.**—If an instruc-

[30] Rogers v. S. (Miss.), 21 So. 130.

[31] Ritter v. S. 70 Ark. 472, 69 S. W. 262.

[32] Calumet & C. C. & D. Co. v. Morawetz, 195 Ill. 406, 63 N. E. 165.

[33] Best Brewing Co. v. Dunlevy, 157 Ill. 141, 41 N. E. 611.

[34] Spring Valley Coal Co. v. Rowatt, 196 Ill. 156, 63 N. E. 649.

[35] Tedens v. Sanitary Dist. 149 Ill. 87, 96, 36 N. E. 1033; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 626, 35 N. E. 162.

tion, though erroneous when standing alone, in that it assumes the existence of a disputed material fact, yet when considered in connection with all the other instructions given on both sides clearly appears not to be misleading or improper, the error is harmless.[36] But a bad instruction will not be cured by others which state the law correctly except in cases that are plain and entirely free from doubt.[37]

§ 243. Verdict clearly right and justice done.—If the verdict is clearly right under the evidence it should not be disturbed although the instructions may be erroneous.[38] Or, when from the nature of the evidence and the issues presented by the pleadings, the verdict could not have been reasonably different, the error as to the instructions will be regarded as immaterial and harmless.[39] So where the record discloses that a party was not enti-

[36] City of Elgin v. Joslyn, 136 Ill. 529, 26 N. E. 1090; Chicago C. R. Co. v. Hastings, 136 Ill. 251, 26 N. E. 594; East St. L. C. R. Co. v. Enright, 152 Ill. 246, 38 N. E. 553; Illinois Cent. R. Co. v. Swearingen, 47 Ill. 210; Scutt v. Woolsey, 47 N. Y. S. 320; City of San Antonio v. Kreusel, 17 Tex. Cv. App. 594, 43 S. W. 615; Everett v. Spencer, 122 N. Car. 1010, 30 S. E. 334; Willoughby v. North Eastern R. Co. 52 S. Car. 166, 29 S. E. 629; Anderson v. Daly Mining Co. 16 Utah, 28, 50 Pac. 815; Cicero St. R. Co. v. Rollins, 195 Ill. 220, 63 N. E. 98; Neufeld v. Roderninski, 144 Ill. 83, 89, 32 N. E. 913; Scott v. P. 141 Ill. 195, 205, 30 N. E. 329; Citizens' Gas Light Co. v. O'Brien, 118 Ill. 182, 8 N. E. 310.

[37] Quirk v. St. Louis N. E. Co. 126 Mo. 460, 28 S. W. 1080.

[38] Bartley v. Metropolitan St. R. Co. 148 Mo. 124, 49 S. W. 840; Hall v. Sroufe, 52 Ill. 421; Perry v. Makenson, 103 Ind. 302, 2 N. E. 713; Wolfe v. Pugh, 101 Ind. 309; Lafayette & I. R. Co. v. Adams, 26 Ind. 76; Ward v. Cochran, 71 Fed. 127; Evans v. Merritt, 62 Ark. 228, 35 S. W. 212; Sullivan v. Jefferson Ave. R. Co. 133 Mo. 1, 34 S. W. 566; South Chicago C. R. Co. v. Dufreene, 200 Ill. 464, 65 N. E. 1075; Vogg v. Missouri P. R. Co. 138 Mo. 172, 36 S. W. 646; Secor v. Oregon I. Co. 15 Wash. 35, 45 Pac. 654; Davis v. Gilliam, 14 Wash. 206, 44 Pac. 119; Turner v. Ft. Worth & D. C. R. Co. (Tex. Cv. App.), 30 S. W. 253; Rose v. Bradley, 91 Wis. 619, 65 N. W. 509; Mehurin v. Stone, 37 Ohio St. 49; City of Beardstown v. Clark, 204 Ill. 526, 68 N. E. 378; Chicago & A. R. Co. v. Murphy, 198 Ill. 471, 64 N. E. 1011.

[39] King v. King, 155 Mo. 406, 56 S. W. 534; Wagoner v. Wabash R. Co. 185 Ill. 154, 56 N. E. 1056; Cooper v. Delk, 108 Ga. 550, 34 S. E. 145; Hiner v. Jeanpert, 65 Ill. 429; Robinson v. Hyer, 35 Fla. 544, 17 So. 745; Gruber v. Decker, 115 Ga. 779, 42 S. E. 82; Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426, 63 N. E. 778, 62 N. E. 658; Baxter v. Lusher, 159 Ind. 381, 65 N. E. 211; Thompson v. P. 125 Ill. 261, 17 N. E. 749; Vinson v. Scott, 198 Ill. 542, 65 N. E. 78; Telegraph Co. v. Lowrey, 32 Neb. 732, 49 N. W. 707. See Swearingen v. Inman, 198 Ill. 255, 65 N. E. 80; S. v. Hill, 47 Neb. 456, 66 N. W. 541; Blackman v. Housels (Tex. Cv. App.), 31 S. W. 511; Chicago & E. I. R. Co. v. Knieram, 152 Ill. 467, 39 N. E. 324; Metropolitan W. & S. E. R. Co. v. Skola, 183 Ill. 455, 56 N. E. 171, 75 Am. St. 120; Gray v. Merriam, 148 Ill. 188, 35 N. E. 810, 39 Am. St. 172; Vanhousen v. Broehl, 59 Neb. 48, 80 N. W. 260; Foster v.

tled to a verdict under the most favorable construction of the evidence, he cannot complain of error as to the instructions.[40] Or where it does not reasonably appear that the giving of an instruction on a matter which was not presented by the pleadings nor supported by evidence, in any manner affected the verdict, the error will not warrant the reversal of the judgment.[41]

So where the evidence standing uncontradicted is sufficient to sustain the verdict rendered, error in the giving of instructions will be regarded as harmless.[42] Thus, where the plaintiff's cause of action is clearly established by the admissions of the defendant, there can be no ground for complaint in the giving or refusing instructions even though they are erroneous.[43] The refusal of the court to give a proper instruction on behalf of the defendant is harmless error where the undisputed evidence conclusively shows his guilt.[44] Or if it appears that substantial justice has been done, and the jury could have reached no other result from the evidence, the refusal of instructions, though correct, will not be sufficient ground for reversal.[45]

A judgment will not be reversed for error in the instructions,

Chicago & A. R. Co. 84 Ill. 164; Greer v. Lafayette Co. Bank, 128 Mo. 559, 30 S. W. 319; Thompson v. Force, 65 Ill. 370; Strohm v. Hayes, 70 Ill. 41, 45; Cusick v. Campbell, 68 Ill. 508; Lawrence v. Jarvis, 32 Ill. 304, 312; Texas, &c. R. Co. v. Nolan, 62 Fed. 552; Stratton v. Dale, 45 Neb. 472, 63 N. W. 875; Glover v. Blakeslee, 115 Ga. 696, 42 S. E. 40; Dodds v. McCormick Harvesting M. Co. 62 Neb. 759, 87 N. W. 911; Leftwich v. City of Richmond, 4 Va. Super. Ct. 128, 40 S. E. 651.

Where the verdict is warranted by the evidence slight inaccuracies in the charge cannot be urged as material error: Strong v. S. 95 Ga. 499, 22 S. E. 299; Collier v. Jenks, 19 R. I. 493, 34 Atl. 998 (as to burden of proof); see Texas P. & R. Co. v. Reed (Tex. Cv. App.), 32 S. W. 118; Bank of H. v. Napier, 41 W. Va. 481, 23 S. E. 800.

[40] Elster v. Springfield, 49 Ohio St. 82, 30 N. E. 274; Frank v. Williams, 36 Fla. 136, 18 So. 351.

[41] Boygero v. Southern R. Co. 64 S. Car. 104, 41 S. E. 819.

[42] Dwelling House Ins. Co. v. Dowdall, 55 Ill. App. 622.

[43] Shultz v. Babcock, 166 Ill. 398, 46 N. E. 892.

[44] Brown v. S. (Tex. Cr. App.), 65 S. W. 906.

[45] Ryan v. Donnelly, 71 Ill. 104; Pahlman v. King, 49 Ill. 269; Schwarz v. Schwarz, 26 Ill. 81, 85; Beseler v. Stephani, 71 Ill. 404; Jones v. Chicago & Iowa R. Co. 68 Ill. 380, 384; DeClerg v. Mungin, 46 Ill. 112; Elam v. Badger, 23 Ill. 445, 450; Mode v. Beasley, 143 Ind. 306, 42 N. E. 727; Jordan v. James, 5 Ohio, 88; Thompson v. P. 125 Ill. 261, 17 N. E. 749. See, also, for criminal cases: Dacey v. P. 116 Ill. 576, 6 N. E. 165; Wilson v. P. 94 Ill. 327; Dunn v. P. 109 Ill. 646; Ritzman v. P. 110 Ill. 362; Leach v. P. 53 Ill. 311, 318; Meyer v. S. (Tex. Cr.), 49 S. W. 600; McIntosh v. S. 151 Ind. 251, 51 N. E. 354; Berry v. S. 31 Ohio St. 225; Edelhoff v. S. 5 Wyo. 19, 36 Pac. 627, 9 Am. Cr. R. 262.

unless it appears that the party complaining was in some manner prejudiced.[46] Where the charge submits to the jury matters not material to the issue, there is no ground for reversal unless prejudice is shown by so doing,[47] especially if such immaterial matter merely imposes a burden on the successful party without injury or prejudice to the other.[48]

But the giving of an erroneous charge on a vital point or controlling issue involved in a case will be presumed prejudicial unless the record clearly shows the contrary.[49] If the issues are not fairly submitted to the jury the court will not be authorized to look into the testimony to ascertain whether the weight of the evidence was or was not favorable to a verdict. A party is entitled to have the issues passed upon by the jury under proper instructions.[50] Where the plaintiff's own testimony shows that the defendant agreed to pay him only one hundred dollars for certain services, an instruction that the defendant agreed to pay him two hundred dollars is material error, although the jury rendered a verdict of only one hundred dollars for the plaintiff, the defendant having contested and denied the whole of the plaintiff's claim.[51]

§ **244. Erroneous instruction favorable is harmless.**—A party has no cause to complain of an erroneous instruction which is favorable to him rather than harmful.[52] Thus, for instance, an instruction erroneously requiring the plaintiff to prove a matter by a higher degree of proof than by a preponderance, is error of which the defendant cannot complain, being favorable to him.[53] Submitting to the jury an issue not supported by any

[46] Easley v. Valley M. L. Asso. 91 Va. 161, 21 S. E. 235; Stein v. Vamice, 44 Neb. 132, 62 N. W. 464; Wallace v. Cravens, 34 Ind. 534; Beavers v. Mo. Pac. R. Co. 47 Neb. 761, 66 N. W. 821; River Boom Co. v. Smith (Wash.), 45 Pac. 750; Chase v. Washburn, 1 Ohio St. 244.

[47] White v. Ross, 35 Fla. 377, 17 So. 640; Gulf C. & S. F. R. Co. v. Duvall, 12 Tex. Cv. App. 348, 35 S. W. 699 (issue not essential to plaintiff's right to recover).

[48] McCary v. Stull, 44 Neb. 175, 62 N. W. 501.

[49] Baldwin v. Bank of Massillon, 1 Ohio St. 141; Lowe v. Lehman, 15 Ohio St. 179; Jones v. Bangs, 40 Ohio St. 139 49 Am. R. 664, note; Pendleton St. R. Co. v. Stellman, 22 Ohio St. 1.

[50] Globe Ins. Co. v. Sherlock, 25 Ohio St. 67.

[51] Pipkin v. Home (Tex. Cv. App.), 68 S. W. 100.

[52] Kitchell v. Bratton, 2 Ill. (1 Scam.), 300; Missouri, K. & T. R. Co. v. Cook, 12 Tex. Cv. App. 203, 33 S. W. 669; Kugler v. Wiseman, 20 Ohio, 361; S. v. Hicks (Mo.), 77 S. W. 542. Lindell v. Deere-Wells Co. (Neb.), 92 N. W. 164.

[53] Doran v. Cedar Rapids & M. C. R. Co. 117 Iowa, 442, 90 N. W. 815; Baltimore & O. R. Co. v. Countryman, 16 Ind. App. 139, 44 N. E. 265.

evidence but which is favorable to the party, is not error of which he can complain.[54]

§ 245. Principle or element refused or omitted.—The refusal of an instruction correctly stating a principle of law clearly applicable to the evidence and pleadings which is not contained in any other instruction given is manifest error,[55] especially if the

[54] S. v. Brown, 145 Mo. 680, 47 S. W. 789; S. v. Kindred, 148 Mo. 270, 49 S. W. 845; Miller v. Root, 77 Iowa, 545, 42 N. W. 502.

The errors complained of in the giving or refusing of instructions in the following cases were held to be harmless:

Bowen v. Southern R. Co. 58 S. Car. 222, 36 S. E. 590; Blair v. City of Groton, 13 S. Dak. 211, 82 N. W. 48; Fox v. Boyd, 104 Tenn. 357, 58 S. W. 221; Shannon v. Jefferson City, 125 Ala. 384, 27 So. 977; Smitson v. Southern P. Co. 37 Ore. 74, 60 Pac. 907; Bibb County v. Ham, 110 Ga. 340, 35 S. E. 656; Horgan v. Brady, 156 Mo. 659, 56 S. W. 294; Nelson v. Terry (Ky.), 56 S. W. 672; Ward v. Odell Mfg. Co. 126 N. Car. 946, 36 S. E. 194; Lassiter v. Norfolk & C. R. Co. 126 N. Car. 509, 36 S. E. 48; Searcy v. Martin-Woods Co. 93 Iowa, 420, 61 N. W. 934; Neill v. Jordan, 15 Mont. 47, 38 Pac. 223; Johnson v. Hirschberg, 185 Ill. 445, 57 N. E. 26; Chicago & A. R. Co. v. Keegan, 185 Ill. 70, 56 N. E. 1088; Scrivani v. Dondero, 128 Cal. 31, 60 Pac. 463; Hamman v. Central Coal & Coke Co. 156 Mo. 232, 56 S. W. 1091; Glover v. Charleston & S. R. Co. 57 S. Car. 228, 35 S. E. 510; Ellis v. Stone (Tex. Cv. App.), 55 S. W. 758; Bussanicy v. Myers, 22 Wash. 369, 60 Pac. 1117; Sears Adm'r v. Louisville & N. R. Co. 22 Ky. 152, 56 S. W. 725; St. Louis, I. M. & S. R. Co. v. Magness, 68 Ark. 289, 57 S. W. 33; Houston & T. C. R. Co. v. White, 23 Tex. Cv. App. 280, 56 S. W. 204; Brunette v. Town of Gagen, 106 Wis. 618, 82 N. W. 564; Grace v. St. Louis R. Co. 156 Mo. 295, 56 S. W. 1121; Austin R. T. Co. v. Grothe, 88 Tex. 262, 31 S. W. 196; Traxler v. Greenwich Tp. 168 Pa. St. 214, 31 Atl. 1090; Wells v. Houston, 29 Tex. Cv. App. 619, 69 S. W. 183; Heminway v. Miller, 87 Minn. 123, 91 N. W. 428; Hoges v. Nalty, 113 Wis. 567, 89 N. W. 535; Davidson v. Jefferson (Tex. Cv. App.), 68 S. W. 822; Logansport & W. V. Gas Co. v. Coate, (Ind. App.), 64 N. E. 638; Clapp v. Royer, 28 Tex. Cv. App. 29, 67 S. W. 345; City Transfer Co. v. Draper, 115 Ga. 954, 42 S. E. 221; Union Pac. R. Co. v. Ruzicka (Neb.), 91 N. W. 543; Driver v. Board, &c. 70 Ark. 358, 68 S. W. 26; McNeil v. Durham, 130 N. Car. 256, 41 S. E. 383; Charles Schatzlein Paint Co. v. Passmore, 26 Mont. 500, 68 Pac. 1113; Stowers v. Singer, 24 Ky. 395, 68 S. W. 637, 67 S. W. 822; Yale v. Newton, 130 Mich. 434, 90 N. W. 37; In re Reed's Estate, 86 Minn. 163, 90 N. W. 319; Westinghouse Co. v. Gainor, 130 Mich. 393, 90 N. W. 52.

Held harmful in the following cases:

Frick v. Kabaker, 116 Iowa, 494, 90 N. W. 498; St. Louis, I. M. & S. R. Co. v. Woodward, 70 Ark. 441, 69 S. W. 55; Evans Lumber Co. v. Crawford (Neb.), 93 N. W. 177; Stuck v. Yates, 30 Ind. App. 441, 66 N. E. 177; Ballow v. S. (Tex. Cr. App.), 609 S. W. 513; S. v. Howard, 41 Ore. 49, 69 Pac. 50; S. v. Phillips, 119 Iowa, 642, 94 N. W. 229; Barnesville Man. Co. v. Love (Del.) 52 Atl. 267; S. v. Crawford, 31 Wash. 260, 71 Pac. 1030; Western U. Tel. Co. v. Sorsby, 29 Tex. Cv. App. 345, 69 S. W. 122; Chicago, B. & Q. R. Co. v. Camper, 199 Ill. 569, 65 N. E. 448; P. v. Goodrode (Mich.), 94 N. W. 14.

[55] Bennett v. Connelly, 103 Ill. 50, 53; Last Chance M. & M. Co. v. Ames,

refused instruction relates to disputed questions of fact which are vital in determining the rights of the party requesting the instruction.[56] And the giving of an instruction which omits a material fact or element essential to a correct statement of the law, which is not contained in any other of the instructions, is error.[57] And the omission of a material element, such, for instance, as "due care and caution" on the part of the person injured, under some state of the facts is error, although other instructions contain the element thus omitted.[58]

Thus, in an action for personal injury, the refusal to instruct that if the plaintiff was riding a wheel at the time he was injured he could not recover, is such error that the giving of a general instruction that to entitle the plaintiff to recover he must have been in the exercise of due care, or that he could not recover unless he received the injuries in the manner alleged in his declaration,[59] will not mend. In an action against a street car company, a charge that "if you find that the plaintiff could have crossed the street and avoided the car but for the carelessness of the defendant's driver and his impetuous driving, you must find for the plaintiff," is erroneous, in that it eliminates contributory negligence; and the giving of an instruction for the

23 Colo. 167, 47 Pac. 382; Ginnard v. Knapp, 95 Wis. 482, 70 N. W. 671; Maxwell v. Chapman, 26 N. Y. S. 361, 74 Hun, 111; Selma St. & S. R. Co. v. Owen, 132 Ala. 420; 31 So. 598; New York, P. & N. R. Co. v. Thomas, 92 Va. 606, 24 S. E. 264; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; Harvey v. S. 125 Ala. 47, 27 So. 763; Soney v. S. 13 Lea (Tenn.), 472; Kinkle v. P. 27 Colo. 459, 62 Pac. 197; Brainard v. Burton, 5 Vt. 97; Sperry v. Spaulding, 45 Cal. 544; Nichols v. S. 46 Miss. 284; Keith v. Spencer, 19 Fla. 748; Lytle v. Boyer, 33 Ohio St. 506; Morris v. Platt, 32 Conn. 75; Cooper v. Mulder, 74 Mich. 374, 41 N. W. 1084; Suttle v. Finnegan, 86 Ill. App. 423; Anderson v. City of Bath, 42 Me. 346.

[56] Binkley v. Dewell (Kas. App.). 58 Pac. 1028. See Gulf C. & S. F. R. Co. v. Warner, 22 Tex. Cv. App. 167, 54 S. W. 1064; Lewis v. S. 4 Ohio, 397; Lytle v. Boyer, 33 Ohio St. 506, 511; Mallen v. Waldowski, 203 Ill. 91, 67 N. E. 409.

But the refusal to instruct on matters not material to the issue is not error, Mendenhall v. North Carolina R. Co. 123 N. Car. 275, 31 S. E. 480.

[57] Chicago & A. R. Co. v. Pennell, 94 Ill. 448, 454; Galveston Land & I. Co. v. Levy, 10 Tex. Cv. App. 104, 30 S. W. 504; Pritchett v. Johnson (Neb.), 97 N. W. 224.

[58] Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88, 91; Callahan v. City of Port Huron, 128 Mich. 673, 87 N. W. 880.

[59] Callahan v. City of Port Huron, 128 Mich. 673, 87 N. W. 880. Compare: Mallen v. Waldowski, 203 Ill. 91, 67 N. E. 409.

defendant that the plaintiff could not recover if he was negligent would not cure the error.[60]

§ 246. How a correct instruction cures defective one.—An instruction which assumes or undertakes to state a complete case cannot be truly regarded as but one of a series of instructions in the sense that it may be supplemented or qualified by others in the same series in such manner that an error in it will be cured. In other words, an error in such instruction cannot be cured by supplementary or qualifying instructions.[61] An instruction based upon only a portion of the evidence bearing upon the main issue is erroneous, and the giving of a subsequent instruction stating the law correctly will not cure the error.[62]

On the subject as to when a correct instruction does or does not cure a defective one, the Supreme Court of Illinois has used the following language: "Where instructions which are defective are cured by others unobjectionable, the latter must either directly refer to, and explain and qualify the former, or be supplementary to the former and supply what was omitted from the former; but obviously where the latter are supplementary to the former instructions the former must be correct as far as they go, and defective only in not going farther and including what is supplied by the supplementary instructions. But where one instruction says the law is one thing with regard to a particular matter or state of circumstances, and another instruction that the law is another and materially different thing with regard to precisely the same matter or state of circumstances, the instructions are repugnant and no repetition of the correct instruction can cure the errors of those that are incorrect; for the jury, assuming as is their duty, that they are all

[60] Lifschitz v. Dry Dock E. B. & B. R. Co. 73 N. Y. 888, 67 App. Div. 602.

An instruction assuming to state an hypothetical case must not omit any material fact, Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 640, 15 Am. R. 633.

[61] Graff v. P. 134 Ill. 383, 25 N. E. 583. See Kurstelska v. Jackson, 89 Minn. 95, 93 N. W. 1054; Cleveland, C. & C. R. Co. v. Crawford, 24 Ohio St. 640, 15 Am. R. 633.

[62] Burlingim v. Bader, 45 Neb. 673, 63 N. W. 919.

A remittitur as to one of several items of damages claimed will not cure an error in an instruction which applies to the several items of damages: Hartford Deposit Co. v. Calkins, 186 Ill. 104, 57 N. E. 863.

correct, may as readily follow those that are incorrect as those that are correct."[63]

In Mississippi, where an abstract proposition of law is incorrectly stated and the same or similar propositions are thereafter correctly set forth in other instructions given, then if, taking the instructions on both sides as a whole, the court can safely affirm that no harm has been done to either side and that the right result has been reached, the verdict will not in such case be disturbed. But where the court undertakes to collate certain facts, and, making a concrete application of the law to such facts, instructs the jury to bring in a verdict if they believe such facts exist, and the facts therein stated will not legally sustain the verdict directed, such error cannot be cured by other instructions correctly stating the law; the reason for the difference being that in the first instance it is simply an erroneous statement of a legal principle which may or may not mislead the jury, according to the varying circumstances of causes, but in the latter instance, where a verdict is directed to be based upon the facts stated in the instruction, other instructions embodying other and different statements of facts and authorizing a verdict to be predicated thereon, do not modify the erroneous instructions, but simply conflict therewith. If by an erroneous instruction the jury is charged to convict if they believe certain facts to exist, and by another instruction the jury is told that they should acquit unless they believe certain other facts also exist, these instructions do not modify, but contradict each other. The one is not explanatory of the other, but in conflict therewith. In such a state of the case the jury are left without any sure or certain guide to conduct them to the proper conclusion.[64] The cases in which it has been held that a bad instruction may be cured by another, are cases where the bad and good instructions, when read together, clearly state the law and where it can be clearly seen that the bad instruction did no harm.[65]

§ 247. Instructions contradictory.—The giving of a correct

[63] Hoge v. P. 117 Ill. 48, 6 N. E. 796.

[64] Harper v. S. (Miss.), 35 So. 575.

[65] Chicago & A. R. Co. v. Keegan, 185 Ill. 80, 56 N. E. 1088. See Guinard v. Knapp S. & Co. 90 Wis. 123, 62 N. W. 625, 48 Am. St. 901.

instruction will not obviate an error in an instruction on the other side where they are entirely variant with each other, and there is nothing to show the jury which to adopt as the law. In such case it is impossible to determine whether the jury followed the correct or erroneous instruction.[66] Nor will the giving of a correct instruction at the request of either party correct a material error in a bad instruction where the instructions are contradictory. The correct instruction cannot be said to modify or supplement the wrong one as is the case where they are not contradictory.[67] A charge containing positive error

[66] Chicago & A. R. Co. v. Keegan, 185 Ill. 79, 56 N. E. 1088; Chicago, B. & Q. R. Co. v. Dunn, 61 Ill. 385; Central of Ga. R. Co. v. Johnson, 106 Ga. 130, 32 S. E. 78; City of Macon v. Holcomb, 205 Ill. 640, 69 N. E. 79; Kerr v. Topping, 109 Iowa, 150, 80 N. W. 321; McCole v. Loeher, 79 Ind. 430; Harrington v. Priest, 104 Wis. 362, 80 N. W. 442; American Strawboard Co. v. Chicago & A. R. Co. 177 Ill. 513, 53 N. E. 97; Crosby v. Ritchey, 56 Neb. 336, 76 N. W. 895; S. v. Utley, 132 N. Car. 1022, 43 S. E. 820; Edwards v. Atlantic C. L. R. Co. 132 N. Car. 99, 43 S. E. 585 ("Ring the bell *and* blow the whistle"—Ring the bell *or* blow the whistle); Meyer v. Hafmeister (Wis.), 97 N. W. 166; City of Boulder v. Niles, 9 Colo. 421; Summerlot v. Hamilton, 121 Ind. 91, 22 N. E. 973; S. v. Sutton, 99 Ind. 307; Baltimore & O. R. Co. v. Lafferty, 2 W. Va. 104; Chicago & A. R. Co. v. Murphy, 198 Ill. 470, 64 N. E. 1011; Cresler v. City of Ashville (N. Car.), 46 S. E. 739. See, also, St. Louis, I. M. & S. R. Co. v. Beecher, 65 Ark. 64, 44 S. W. 715; Lake S. & M. S. R. Co. v. Miller, 25 Mich. 274; Brown v. McAllister, 39 Cal. 573; Deserant v. Cerrillos Coal Co. 178 U. S. 409; Bluedom v. Missouri Pac. R. Co. 108 Mo. 439, 18 S. W. 1103; Mississippi C. R. Co. v. Miller, 40 Miss. 45; Haight v. Vallet, 89 Cal. 249, 26 Pac. 897; Hoben v. Burlington & .I. R. Co. 20 Iowa, 562; Blume v. S. 154 Ind. 343, 56 N. E. 771; Hart v. Chicago, R. I. & P. R. Co. 56 Iowa, 166, 7 N. W. 9, 41 Am. R. 93; Kelly v. Cable Co. 7 Mont. 70, 14 Pac. 633.

[67] Enright v. P. 155 Ill. 32, 39 N. E. 561; Chicago, B. & Q. R. Co. v. City of Naperville, 166 Ill. 87, 94, 47 N. E. 734; Partridge v. Cutter, 168 Ill. 504, 512, 48 N. E. 125; S. v. Shadwell, 26 Mont. 52, 66 Pac. 508; Illinois Cent. R. Co. v. Cozby, 174 Ill. 109, 119, 50 N. E. 1011; Konold v. Rio Grande W. R. Co. 21 Utah, 379, 60 Pac. 1021; Chicago C. R. Co. v. Dinsmore, 162 Ill. 658, 44 N. E. 887; Farmers' T. N. Bank v. Woodell (Ore.), 61 Pac. 831; Arnett v. Huggins (Colo. App.), 70 Pac. 765 (contradictory as to damages); Werming v. Teeple, 144 Ind. 189, 41 N. E. 600; Pendleton St. R. Co. v. Stallman, 22 Ohio St. 1; Missouri Pac. R. Co. v. Fox, 56 Neb. 746, 77 N. W. 130; Shano v. Fifth Ave. & H. St. Bridge Co. 189 Pa. St. 245, 42 Atl. 128; Green v. Southern Pac. R. Co. 122 Cal. 563, 55 Pac. 577; Griffin v. City of Lewiston (Idaho), 55 Pac. 545; S. v. Webb. 6 Idaho, 428, 55 Pac. 892; Illinois Linen Co. v. Hough, 91 Ill. 67; Baldwin v. Killain, 63 Ill. 550; Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499; Barr v. S. 45 Neb. 458, 63 N. W. 856; Citizens' St. R. Co. v. Shepherd, 107 Tenn. 444, 64 S. W. 710; Kraus v. Haas (Tex. Cv. App.), 25 S. W. 1025; Holt v. Spokane & P. R. Co. 3 Idaho, 703, 35 Pac. 39; Wolf v. Wolf, 158 Pa. St. 621, 28 Atl. 164; Town of Denver v. Myers, 63 Neb. 107, 88 N. W. 191; City of Winchester v. Carroll, 97 Va. 727, 40 S. E.

cannot be cured by contradictory instructions stating the law correctly, unless the latter makes direct reference to and withdraws or qualifies the erroneous charge.[68] And it must appear that the erroneous instructions are plainly withdrawn before the errors will be regarded as cured.[69]

§ 248. Instructions differing widely from each other.—Also the giving of two instructions widely differing from each other on the same vital point in issue in a case is such error that a

37; Payne v. McCormick H. M. Co. 11 Okla. 318. 66 Pac. 287; Denver & R. G. R. Co. v. Fatherington (Colo. App.), 68 Pac. 978; Eureka Fire & M. Ins. Co. v. Percell, 19 Ohio C. C. 135; Lindberg v. Chicago C. R. Co. 83 Ill. App. 433; Linn v. Massilon Bridge Co. 78 Mo. App. 111; Virginia & N. C. Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 976; S. v. Peel, 23 Mont. 358, 59 Pac. 169, 75 Am. St. 529; P. v. Bennett 121 Mich. 241, 80 N. W. 9; Criner v. S. 41 Tex. Cr. App. 290, 53 S. W. 873; Henry v. S. (Tex. Cr. App.), 54 S. W. 592; S. v. Evans, 12 S. Dak. 473, 81 N. W. 893; Palmer v. S. 8 Wyo. 40, 59 Pac. 793; S. v. McClellan, 23 Mont. 532, 59 Pac. 924; Swenie v. S. 59 Neb. 269, 80 N. W. 815; Bleiler v. Moore, 94 Wis. 385, 69 N. W. 164. See, also, Gearing v. Lacher, 146 Pa. St. 397, 23 Atl. 229; Mississippi C. R. Co. v. Miller, 40 Miss. 45; Howell v. S. 61 Neb. 391, 85 N. W. 289; Hickman v. Griffin, 6 Mo. 37; Imhoff v. Chicago & M. R. Co. 20 Wis. 344; McDougal v. S. 88 Ind. 24; Pittsburgh, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Baker v. Ashe, 80 Tex. 356, 16 S. W. 36; Henry v. S. 51 Neb. 149, 70 N. W. 924; Burnett v. S. 60 N. J. L. 255, 37 Atl. 622; Boswell v. District of Columbia, 21 D. C. 526; Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077; S. v. Tatlaw, 136 Mo. 678, 38 S. W. 552; Edwards v. Atlantic Coast L. R. Co. 129 N. Car. 78, 39 S. E. 730; Knight v. Denman, 64 Neb. 814, 90 N. W. 863; Spencer v. Terry's Estate (Mich.), 94 N. W. 372; Harter v. City of Marshall (Tex. Cv. App.), 36 S. W. 294; Eureka Fire & M. Ins. Co. v. Percell 19 Ohio C. C. 135; Lindberg v. Chicago C. R. Co. 83 Ill. App. 433; Linn v. Missillon Bridge Co. 78 Mo. App. 111; Virginia & N. C. Wheel Co. v. Chalkley, 98 Va. 62, 34 S. E. 97; S. v. Peel, 23 Mont. 358, 59 Pac. 169; P. v. Bennett, 121 Mich. 241, 80 N. W. 9; Criner v. S. 41 Tex. Cr. App. 290, 53 S. W. 873; Henry v. S. (Tex. Cr. App.), 54 S. W. 592; S. v. Evans, 12 S. Dak. 473, 81 N. W. 893; Palmer v. S. 9 Wyo. 40, 59 Pac. 793; S. v. McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. 558; Sweenie v. S. 59 Neb. 269, 80 N. W. 815; Bleiler v. Moore, 94 Wis. 385, 69 N. W. 164; S. v. Tatlaw, 136 Mo. 678, 38 S. W. 552; Henry v. S. 51 Neb. 149, 70 N. W. 924; Burnett v. S. 60 N. J. 255, 37 Atl. 622; Boswell v. District of C. 21 D. C. 526; Richardson v. Halstead, 44 Neb. 606, 62 N. W. 1077.

[68] Missouri, K. & T. R. Co. v. Miller (Tex. Cv. App.), 65 S. W. 74; Baker v. Ashe, 80 Tex. 357, 16 S. W. 36; Chicago & E. R. Co. v. Lee, 29 Ind. App. 480, 64 N. E. 675; International & G. N. R. Co. v. Anchond (Tex. Cv. App.), 68 S. W. 743; S. v. Fitzgerald, 72 Vt. 142, 47 Atl. 403; Heyl v. S. 109 Ind. 589, 10 N. E. 916; Imhoff v. Chicago & M. R. Co. 20 Wis. 344; Guetig v. S. 63 Ind. 278, 3 Am. Cr. R. 233.

[69] McCrory v. Anderson, 103 Ind. 16, 2 N. E. 211; Klugen v. S. 45 Ind. 521; Binns v. S. 66 Ind. 428; Toledo, N. & W. R. Co. v. Schuckman, 50 Ind. 42; Lower v. Franks, 115 Ind. 340, 17 N. E. 630; Gulf C. & S. F. R. Co. v. White (Tex. Cv. App.), 32 S. W. 322.

new trial will be given.[70] An absolute misstatement of the law in giving instructions is not corrected by properly stating the law in other instructions.[71] But where two instructions are inconsistent or contradictory, one correct and the other incorrect, if it appears that the jury followed the correct one in reaching the verdict the error is immaterial.[72] And if a party was not entitled to an instruction which was given at his request he cannot claim error that another given for his opponent was contradictory to it.[73]

§ 249. Instructions self-contradictory.—An instruction which is itself contradictory in its own terms, is eroneous. Thus an instruction directing the jury that if the defendant was mentally incompetent to protect his own interests in making a contract, then, although they may believe he understood the same, they should find he was not mentally competent, and that the contract was invalid, is self-contradictory.[74] An ordinance prohibiting driving at a greater rate of speed than six miles an hour having been introduced on the trial of a homicide case, an instruction charging the jury that "if the defendant was engaged in the commission of an unlawful act not amounting to a felony, and while so engaged ran over and killed the deceased, whether he intended to do so or not, it is manslaughter," is inconsistent with a charge that driving at a greater rate of speed than six miles an hour does not of itself prove guilt, and that the defendant cannot be convicted unless he was driving in a dangerous manner. The charges are contradictory.[75]

[70] Toledo, W. & W. R. Co. v. Larmon, 67 Ill. 71; Pittsburg, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332; Beck v. S. 51 Neb. 106, 70 N. W. 498; Bibby v. S. (Tex. Cr. App.), 65 S. W. 193.

[71] S. v. Adrion, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. 678; Raker v. S. 50 Neb. 202, 69 N. W. 749. See, also, Bruce v. Beall, 99 Tenn. 303, 41 S. W. 445; Pittsburg, C. C. & St. L. R. Co. v. Noftsger, 148 Ind. 101, 47 N. E. 332.

[72] Hillebrant v. Green, 93 Iowa, 661, 62 N. W. 32.

[73] Moore v. Graham, 29 Tex. Cv. App. 235, 69 S. W. 200. See Williams v. Southern Pac. R. Co. 110 Cal. 457, 42 Pac. 974; Reardon v. Mo. Pac. R. Co. 114 Mo. 384, 21 S. W. 731.

[74] Sands v. Potter, 165 Ill. 402, 46 N. E. 282, 56 Am. St. 253; Blume v. S. 154 Ind. 343, 56 N. E. 771. See International & G. N. R. Co. v. Lehman (Tex. Cv. App.), 66 S. W. 214.

[75] P. v. Pearne, 118 Cal. 154, 50 Pac. 376. See Lemasters v. Southern Pac. R. Co. 131 Cal. 105, 63 Pac. 128; Elk Tanning Co. v. Brennan, 203 Pa. St. 232, 52 Atl. 246; Hoover v. Mercantile T. M. Ins. Co. 93 Mo. App. 111, 69 S. W. 42; Carter v. Fulgham, 134 Ala. 238, 32 So. 684. Instructions held contradictory: Grim v. Murphy, 110 Ill. 271; Frederick v. Allgaier, 88 Mo. 598; Mov-

§ 250. Evidence close, conflicting or doubtful.—Where the facts of a case are close or conflicting on a vital point all of the instructions should state the law accurately. In such state of the facts it is not sufficient that the jury were fully instructed on behalf of the opposing party on every material question involved.[76] Where the evidence is conflicting and contradictory, and the case is one which may on the facts be decided either way, it is of the greatest importance that all the instructions should be accurate.[77]

When the evidence is so evenly balanced that the jury might be justified in finding either way, it is highly important that the law should be stated to the jury accurately in the giving of instructions.[77*] In such state of the evidence the slightest intimation of the opinion of the court or the assumption of a material fact in the giving of instructions is error, although the law may be correctly stated in others given.[78] Also, if the evidence is close or

ar v. Harvey, 125 Mass. 574. Instructions held not contradictory: Underwood v. Wolf, 131 Ill. 425, 434, 23 N. E. 842, 19 Am. St. 40; McMahon v. Sankey, 133 Ill. 637, 641, 24 N. E. 1027; Waxahachie Cotton Oil Co. v. McLain, 27 Tex. Cv. App. 334, 66 S. W. 226; S. v. Moore, 163 Mo. 432, 68 S. W. 358; Larkin v. Burlington, C. R. & N. R. Co. 91 Iowa, 654, 60 N. W. 195.

[76] Chicago & N. R. Co. v. Dimick, 96 Ill. 47; Stratton v. Central City H. R. Co. 95 Ill. 32; Steinmeyer v. P. 95 Ill. 390; Ruff v. Jarrett, 94 Ill. 480; Toledo, St. L. & K. Co. v. Cline, 135 Ill. 48, 25 N. E. 846; Chicago, B. & Q. R. Co. v. Dougherty, 110 Ill. 525; Rumbold v. Royal League, 206 Ill. 517, 69 N. E. 590; Chicago & A. R. Co. v. Murray, 62 Ill. 331; Illinois C. R. Co. v. Gilbert, 157 Ill. 365, 41 N. E. 724; Eller v. P. 153 Ill. 344, 38 N. E. 660; Swan v. P. 98 Ill. 612; Craig v. Miller, 133 Ill. 307, 24 N. E. 431; Grand Lodge v. Orrell, 99 Ill. App. 246; Chicago, B. & Q. R. Co. v. Van Patten, 64 Ill. 514; Illinois C. R. Co. v. Moffitt, 67 Ill. 431; Finks v. Cox. (Tex. Cv. App.), 30 S. W. 512; Norfleet v. Sigman, 41 Miss. 631; Adams v. S. 29 Ohio St. 412; Gilmore v. McNeil, 45 Me. 599.

[77] Holloway v. Johnson, 129 Ill. 367, 21 N. E. 798; Wilber v. Wilber, 129 Ill. 396, 21 N. E. 1076; Kankakee Stone & S. Co. v. City of Kankakee, 128 Ill. 177, 20 N. E. 670; Parmley v. Farrar, 169 Ill. 607, 48 N. E. 693; Keanders v. Montague, 180 Ill. 306, 54 N. E. 321; Gorrell v. Payson, 170 Ill. 217, 48 N. E. 433; Sinnet v. Bowman, 151 Ill. 156, 37 N. E. 885; Cartier v. Troy Lumber Co. 138 Ill. 538, 28 N. E. 932; American Ins. Co. v. Crawford, 89 Ill. 62; Wabash R. Co. v. Hanks, 91 Ill. 407, 414; Cushman v. Cogswell, 86 Ill. 62; Chicago & E. I. R. Co. v. Garver, 83 Ill. App. 118; Hughes' Cr. Law, §3255, citing: Smith v. P. 142 Ill. 123, 31 N. E. 599; Kirland v. S. 43 Ind. 146, 13 Am. R. 386; P. v. Westlake, 124 Cal. 452, 57 Pac. 465; S. v. Peel, 23 Mont. 358, 59 Pac. 169; S. v. Evans, 12 S. Dak. 473, 81 N. W. 893; Hoge v. P. 117 Ill. 46; 6 N. E. 796; Steinmeyer v. P. 95 Ill. 388; S. v. Pugsley, 75 Iowa, 744; 38 N. W. 498, 8 Am. C. R. 108.

[77*] Shaw v. P. 81 Ill. 150; Waters v. P. 172 Ill. 371, 50 N. E. 148; Adams v. P. 179 Ill. 637, 54 N. E. 296.

[78] Adams v. P. 179 Ill. 638, 54 N. E. 296.

doubtful the law should be accurately stated in the giving of instructions.[79] Where the facts are close or doubtful it is error to refuse specific instructions applicable to the evidence, although the court may have given general instructions on all the issues.[80] Thus, where there is evidence tending to show accord and satisfaction, but there is some uncertainty touching the question of acceptance and room for controversy, the court, in such state of the case, should clearly and accurately state what constitutes an acceptance.[81]

[79] Waters v. P. 172 Ill. 375, 50 N. E. 148; West C. St. R. Co. v. Dougherty, 170 Ill. 379, 48 N. E. 1000; Swift & Co. v. Rutkowski, 167 Ill. 159, 47 N. E. 362; Volk v. Roche, 70 Ill. 299.

[80] Roberts v. S. 114 Ga. 450, 40 S. E. 297.

[81] Troy Min. Co. v. Thomas, 15 S. Dak. 238, 88 N. W. 106.

CHAPTER XIII.

IN CRIMINAL CASES.

Sec.

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Homicide.

§ 251. Degree determined by jury.—Under an indictment for murder, the defendant, if guilty at all, may be convicted of murder, or the included crime of manslaughter, and the law makes it the duty of the jury to determine whether the conviction should be for the one or the other. In such case the court cannot say to the jury by instruction that if certain facts (enumerating them) are true they should find the defendant guilty of murder. The jury should be left free to determine the degree of guilt.[1] Hence to instruct the jury that if they find

[1] Panton v. P. 114 Ill. 509, 2 N. E. 411; Lynn v. P. 170 Ill. 537, 48 N. E. 964; McCoy v. P. 175 Ill. 224, 51 N. E. 777. See Schwabacher v. P. 165 Ill. 624, 46 N. E. 809; P. v. Holmes, 111 Mich. 364, 69 N. W. 501; S. v. Oakes, 95 Me. 369, 50 Atl. 28. Contra: Anderson v. U. S. 18 U. S. 689; S. v. Nelson (Minn.), 97 N. W. 655. See "Included Criminal Offenses." Chap XIV.

from the evidence that the defendant shot and killed the deceased after the latter was disarmed he is guilty of murder, is error under a statute requiring the jury to determine the degree of guilt, in that it invades the province of the jury on that question.[2] But an instruction which properly recites all the elements of the crime of murder may direct the jury to find the defendant guilty of murder if all the elements of murder have been established by the evidence beyond a reasonable doubt.[3]

§ 252. Degree—Erroneous instruction harmless error.—The giving of an erroneous instruction applicable only to the charge of murder is but harmless error where the defendant is convicted of manslaughter, the jury, in legal effect, having acquitted him of murder.[4] Also where an instruction which is clearly erroneous as to the charge of murder in the first degree is applicable to that degree only, the error committed in giving it could do no harm in case the verdict rendered is for a lower degree, unless it in some manner contributed in producing the verdict thus rendered.[5] An error committed in the giving of instructions on the law as to the punishment for manslaughter, if the jury should find the defendant guilty of that crime, affords no ground to complain of error in that respect where the

[2] Gafford v. S. 125 Ala. 1, 28 So. 406. See Ragland v. S. 111 Ga. 211, 36 S. E. 682; Smith v. P. 142 Ill. 123, 31 N. E. 599; Brown v. S. 109 Ala. 70, 20 So. 103; S. v. Locklear, 118 N. Car. 1154, 24 S. E. 410; S. v. Gadberry, 117 N. Car. 811, 23 S. E. 477. It has been held that where the accused asked an instruction which precluded the jury from finding him guilty of murder in the second degree or of manslaughter in either degree, but confined them to a conviction of murder in the first degree or not guilty, it was properly refused, Swope v. S. 115 Ala. 40, 22 So. 479.

[3] Carle v. P. 200 Ill. 494, 66 N. E. 32, 93 Am. St. 208. On a trial for murder an instruction directing the jury that if they find the defendant guilty of murder they should state in their verdict "guilty," and if they should find him guilty of manslaughter, write "guilty of manslaughter," is proper. S. v. Owens, 44 S. Car. 324, 22 S. E. 244; S. v. Faile, 43 S. Car. 52, 20 S. E. 798.

[4] Belt v. P. 97 Ill. 469 (malice); Baxton v. S. 157 Ind. 213, 61 N. E. 195. See S. v. Gates, 130 Mo. 351, 32 S. W. 971, holding the same rule applicable to larceny, having the included offense petit larceny.

[5] McCoy v. S. 40 Fla. 494, 24 So. 485; Rains v. S. 152 Ind. 69, 52 N. E. 450 (malice); S. v. Robertson, 54 S. Car. 147, 31 S. E. 868 (malice). See, also, Blackwell v. S. 33 Tex. Cr. App. 278, 32 S. W. 128; Rutledge v. S. (Tex. Cr. App.), 33 S. W. 347; Tigerina v. S. 35 Tex. Cr. App. 302, 33 S. W. 353; Jackson v. S. 91 Wis. 253, 64 N. W. 838 (rape and fornication).

jury have found the defendant guilty of murder in the first degree and fixed his puninshment at death.[6]

The court in charging the jury as to the law of murder in the second degree does not err by defining murder in the first degree for the purpose of giving the jury a better understanding of the meaning of murder in the second degree, where the charge also advises the jury that the defendant is not on trial for murder in the first degree.[7] Also on the trial of an indictment for manslaughter it is not improper, in charging the jury, to define murder in its various degrees, and justifiable homicide also, for the purpose of giving the jury a proper understanding of the meaning of manslaughter.[8] In Missouri it has been held to be reversible error in a murder case, where a conviction was had for manslaughter, to give instructions on the law of manslaughter, where the evidence conclusively showed that the defendant, if guilty at all, was guilty of nothing but murder in the first degree.[9] Also where there is no evidence tending to prove any crime except murder in the first degree, it is error for the court to give an instruction defining murder in the second degree.[10]

§ 253. Instructions when degree is doubtful.—If there be a reasonable doubt whether the evidence shows the defendant to be guilty of murder or manslaughter, the jury should give him the benefit of such doubt and find him guilty of the lesser rather than the greater crime, and an instruction so directing them is proper when given in connection with other instructions to acquit entirely if the evidence fails to establish his guilt beyond a reasonable doubt.[11] But the failure of the court to instruct that if the jury are in doubt as to which degree the defendant

[6] Smith v. Com. 17 Ky. 439, 31 S. W. 724.

[7] McQueen v. S. 103 Ala. 12, 15 So. 824.

[8] Weightnovel v. S. (Fla.), 35 So. 862.

[9] S. v. Punshon, 124 Mo. 448, 27 S. W. 1111.

[10] S. v. Mahley, 68 Mo. 315, 3 Am. Cr. R. 184; Bugg v. Com. 18 Ky. L. R. 844, 38 S. W. 684. Instructions as to the different degrees of homicide held sufficient: Hamilton v. S. 62 Ark. 543, 36 S. W. 1054; Com. v. Berchine, 168 Pa. St. 603, 32 Atl. 109. Contra: S. v. Meyer, 58 Vt. 457, 3 Atl. 195, 7 Am. Cr. R. 434.

[11] S. v. Mason, 54 S. Car. 240, 32 S. E. 357; Danghrill v. S. 113 Ala. 7, 21 So. 378. See Stone King v. S. 118 Ala. 68, 24 So. 47. See, also, Newport v. S. 140 Ind. 299, 39 N. E. 926; Mullins v. Com. 23 Ky. L. R. 2433, 67 S. W. 824; Payne v. Com. 1 Metc. (Ky.), 370; S. v. Anderson, 86 Mo. 309; P. v. Chun Heong, 86 Cal. 329, 24 Pac. 1021; Clark v. Com. 23 Ky. L. R. 1029, 63 S. W. 740.

is guilty, they should convict him of the lower degree, is not material error where the evidence shows the killing to have been wilful and the instructions clearly define murder and manslaughter in their several degrees.[12] A charge that "if upon the whole case you have a reasonable doubt of the defendant having been proved guilty, or if you find him guilty, but have a reasonable doubt from the evidence as to whether he has been proved guilty of murder or manslaughter, then you will find him guilty of manslaughter," is erroneous, in that it literally directs the jury to find the accused guilty of manslaughter if, upon the whole case, they have a reasonable doubt of his guilt of any offense.[13] But the doubt as to the degree of the homicide should be a reasonable doubt, not a "doubt."[14]

§ 254. **"Cooling time"—When a question of law.**—The court may, as a matter of law, instruct that the defendant had sufficient cooling time after being provoked to a heat of passion, where the evidence clearly warrants the instruction, and that in such case an unlawful killing would not be reduced to manslaughter.[15]

§ 255. **Self-defense—Instructions proper and improper.**—The refusal to give instructions properly requested, embracing the law of self-defense, is error when there is any evidence, though slight, upon which to base them;[16] or the giving of instructions submitting the theory of the prosecution which ignores

[12] S. v. Wells, 54 Kas. 161, 37 Pac. 1005.

[13] Smith v. Com. 108 Ky. 57, 55 S. W. 718.

[14] S. v. May, 172 Mo. 630, 72 S. W. 918; S. v. Anderson, 86 Mo. 309; Watson v. S. 83 Ala. 60, 3 So. 411.

[15] Ragland v. S. 125 Ala. 534, 27 So. 983. See Thomas v. S. 42 Tex. Cr. App. 386, 56 S. W. 70. See Smith v. S. 103 Ala. 4, 15 So. 843.

[16] Kirk v. Ter. 10 Okla. 46, 60 Pac. 797; Johnson v. S. 75 Miss. 635, 23 So. 579; Chapman v. S. 42 Tex. Cr. App. 135, 57 S. W. 965; Lynch v. S. 41 Tex. Cr. App. 510, 57 S. W. 1130; Morris v. Com. 20 Ky. 402, 46 S. W. 491; Folks v. S. (Tex. Cr. App.), 58 S. W. 98; Washington v. S. 125 Ala. 40, 28 So. 78; Enlow v. S. 154 Ind. 664, 57 N. E. 539; P. v. Zigouras, 163 N. Y. 250, 57 N. E. 465; Lofton v. S. 79 Miss. 723, 31 So. 420; Blalock v. S. 79 Miss. 517, 31 So. 105; Teel v. S. (Tex. Cr. App.), 67 S. W. 531; Trabue v. Com. 23 Ky. L. R. 2135, 66 S. W. 718; Bartay v. S. (Tex. Cr. App.), 67 S. W. 416; Ter. v. Baca (N. Mex.), 71 Pac. 460. See McClurg v. Com. 17 Ky. L. R. 1339, 36 S. W. 14 (instructions held as favorable as warranted by the evidence); Brown v. S. 9 Neb. 157, 2 N. W. 378. Held improper statement of the law of self-defense, Mahaffey v. Ter. (Okla.), 69 Pac. 342.

the evidence tending to prove self-defense, is error.[17] Thus, when the testimony of the defendant shows that the deceased raised his gun and the defendant then shot him, this is sufficient to entitle the defendant to instructions on self-defense, although there is no evidence that the deceased actually pointed the gun towards the defendant.[18] And where the evidence shows that the deceased and others made an attack on the defendant with sticks and clubs, he is entitled to have the jury instructed on the law of self-defense.[19]

But applying the general rule that instructions are improper unless there is evidence to support them, if there is no evidence tending to prove self-defense, then instructions on the law of such defense are improper.[20] And where the evidence clearly and conclusively shows that the killing was not done in self-defense, it is not improper to so state to the jury by instruction.[21] Thus, where the evidence for the prosecution tends to prove murder, and the defendant's that he had nothing to do with the commission of the crime, instructions on self-defense are not applicable.[22] The refusal of the court to instruct on the law of self-defense affords no ground to complain of error where the defendant and his father both testified that the mortal blow was inflicted by the latter, although the evidence for the

[17] Sullivan v. S. 80 Miss. 596, 32 So. 2; Eaverson v. S. 73 Miss. 810, 19 So. 715.

[18] Bedford v. S. 36 Tex. Cr. App. 477, 38 S. W. 210. See Enright v. P. 155 Ill. 32, 35, 39 N. E. 561; Gables v. S. (Tex. Cr. App.), 68 S. W. 288.

[19] Allen v. U. S. 157 U. S. 675, 15 Sup. Ct. 720.

[20] Justice v. Com. 20 Ky. L. R. 386, 46 S. W. 499; S. v. Davis, 104 Tenn. 501, 58 S. W. 122; Cannon v. S. (Tex. Cr. App.), 56 S. W. 351; Navarro v. S. (Tex. Cr. App.), 43 S. W. 105; Leach v. S. 99 Tenn. 584, 42 S. W. 195; S. v. Hyland, 144 Mo. 302, 46 S. W. 195; Kairn v. S. (Tex. Cr. App.), 45 S. W. 703; P. v. Howard, 112 Cal. 135, 44 Pac. 464; Irby v. S. 95 Ga. 467, 20 S. E. 218; Jackson v. Com. 98 Va. 845, 36 S. E. 487; Harmanson v. S. (Tex. Cr. App.), 42 S. W. 995; S. v. Black, 143 Mo. 166, 44 S. W. 340; Nilan v. P. 27 Colo. 206, 60 Pac. 485; Hays v. S. (Tex. Cr. App.), 57 S. W. 835; Tudor v. Com. 19 Ky. L. R. 1039, 43 S. W. 187; Johnson v. S. 100 Tenn. 254, 45 S. W. 436; Lonkster v. S. 41 Tex. Cr. App. 603, 56 S. W. 65; S. v. Byrd, 52 S. Car. 480, 30 S. E. 482; S. v. Craine, 120 N. Car. 601, 27 S. E. 72; Danforth v. S. (Tex. Cr. App.), 69 S. W. 159; Ulun v. S. (Tex. Cr. App.), 32 S. W. 699; Walters v. S. 37 Tex. Cr. App. 388, 35 S. W. 652.

[21] S. v. O'Neil, 58 Minn. 478, 59 N. W. 1101.

[22] Kidwell v. S. 35 Tex. Cr. App. 264, 33 S. W. 342.

It has been held that it is not material error to instruct on the doctrine of imperfect self-defense, though self-defense was not raised as an issue on the trial, Gonzales v. S. (Tex. Cr. App.), 29 S. W. 1091.

prosecution tended to prove that the defendant committed the homicide.[23] So where it appears from the evidence that the deceased did not attempt to assault or harm the defendant a charge on the law of self-defense is properly refused.[24]

§ 256. Self-defense—Instructions on belief and appearances. When a person is assailed or assaulted in such manner as to induce in him a reasonable and well-grounded belief (and he honestly believes) that he is actually in danger of losing his life or suffering great bodily harm, he may then act in defending himself, although it may afterwards turn out that the danger was not real, but only apparent; and the court should instruct the jury accordingly where the evidence tends to support such belief.[25] A mere belief, however, unsupported by evidence, is not sufficient to justify one in acting in self-defense, and an instruction so informing the jury is proper. Such an instruction is not subject to the criticism that it withdraws from the jury the consideration of the right of self-defense where the law on that subject is properly given in other instructions.[26] Accordingly it is not error to instruct that if the circumstances of the killing were such as to produce in the mind of the defendant, or that of any reasonably prudent person situated as he was, the impression that he could save his own life or escape serious bodily harm only by killing the deceased, such killing was justifiable unless the defendant provoked the difficulty with intent to kill the deceased.[27]

An instruction on the law of self-defense which deprives the defendant from acting on such appearance of danger as would cause a reasonable man to act under like circumstances is fatally defective and prejudicial. The defendant is not required to

[23] McDaniel v. S. 100 Ga. 67, 27 S. E. 158.

[24] Brown v. Com. 20 Ky. L. R. 1552, 49 S. W. 545; S. v. Craine, 120 N. Car. 601, 27 S. E. 72. Where it appears from the evidence that the deceased was a man of bad reputation the court may properly charge the jury that the unlawful killing of a bad man is a crime, the same as it is an offense to kill a good man, S. v. Anderson, 126 Mo. 542, 29 S. W. 576.

[25] Campbell v. P. 16 Ill. 17; Enlow v. S. 154 Ind. 664, 57 N. E. 539; Hollingsworth v. S. 156 Mo. 178, 56 S. W. 1087; Steinmeyer v. P. 95 Ill. 389; Steiner v. P. 187 Ill. 245, 58 N. E. 383. See Hughes Cr. Law, § 2442; Presser v. S. 77 Ind. 274; Bryant v. S. 106 Ind. 509, 7 N. E. 217.

[26] S. v. Cochran, 147 Mo. 504, 49 S. W. 558. See Com. v. McGowen, 189 Pa. St. 641, 42 Atl. 365.

[27] Addington v. U. S. 165 U. S. 184, 17 Sup. Ct. 288 See Bell v. S. 115 Ala. 25, 22 So. 526.

show that the killing was "absolutely necessary." He may act from appearances.[28] So an instruction which states that it must appear that the danger was so urgent and pressing that in order to save life or prevent great bodily harm the killing was absolutely necessary is erroneous, in that it holds the defendant to actual and positive danger and deprives him of the right of acting upon appearances.[29] A charge that if the defendant killed the deceased, honestly believing that his own life was in jeopardy, or that he was in imminent danger of receiving serious bodily injury, and that he used no more force than was reasonably necessary to protect himself, then the killing was justifiable, correctly states the law of self-defense.[30] Also a charge that if the defendant killed the deceased, but at the time of the killing the deceased made an attack on him, which caused the defendant to have reasonable expectation or fear of death or serious bodily injury, and acting under the influence of such reasonable expectation or fear, he killed the deceased, the jury should acquit him, is proper.[31] But it must appear that the party killing acted under the influence of such fear, and not in a spirit of revenge.[32]

§ 257. Instructions on threats of deceased.—Evidence that the deceased had previously threatened the defendant is, under some circumstances, very material in determining whether the defendant in good faith acted under a just fear of danger to his life;[33] and it is error for the court, in charging the jury in reference to such threats, to ignore the evidence relating thereto.[34] Thus an instruction that "a mere threat is not sufficient, that the mere drawing of a weapon or show of a weapon is not sufficient," is erroneous where there is evidence that the deceased actually made threats and drew a deadly weapon on the defendant.[35]

[28] Enright v. P. 155 Ill. 35, 39 N. E. 561; S. v. Rolla, 21 Mont. 582, 55 Pac. 523. See S. v. Carter (Wash.), 45 Pac. 745; S. v. Miller (Ore.), 74 Pac. 660; S. v. Castle, 132 N. Car. 769, 46 S. E. 4.

[29] Roach v. P. 77 Ill. 30; S. v. Carter (Wash.), 45 Pac. 745.

[30] P. v. Piper, 112 Mich. 644, 71 N. W. 174.

[31] Price v. S. 36 Tex. Cr. App. 403, 37 S. W. 743.

[32] Keaton v. S. 99 Ga. 197, 25 S. E. 615.

[33] Powell v. S. 19 Ala. 581; Lingo v. S. 29 Ga. 470; S. v. Cushing, 17 Wash. 544, 50 Pac. 512.

[34] Johnson v. S. 105 Ga. 665, 31 S. E. 399.

[35] Johnson v. S. 105 Ga. 665, 31

Telling the jury that "a fear growing out of and only supported by mere words, threats, menaces or contemptuous gestures is not the fear which would justify or excuse another for committing a homicide," is improper where it appears from the evidence that the deceased cut him with a knife.[36] So a charge that former threats made by the deceased to kill the defendant cannot excuse the defendant for killing the deceased if there is nothing indicating a deadly design against the defendant at the time of the killing, is erroneous, in that it omits all reference to the conduct of the deceased, showing an intention to carry out his former threat at the time of the killing.[37] The fact that the deceased had made threats against the defendant (and of which the defendant had been informed) does not warrant the giving of an instruction that such threats may be considered by the jury as tending to show that the defendant killed the deceased through malice or ill will.[38]

§ 258. **Provoking difficulty—Freedom from fault.**—The accused has not the right to provoke a quarrel, take advantage of it and slay his enemy and then justify the killing on the ground of self-defense. He must be wholly free from fault in bringing on the difficulty.[39]

But the burden is not on the defendant to show that he was free from fault in bringing on the difficulty; and an instruction which denies the defendant the right of self-defense unless he shows himself free from fault is therefore erroneous.[40]

If there is no evidence tending to show that the defendant was in the wrong in bringing on the difficulty, then to instruct on that

S. E. 399; Gafford v. S. (Miss.), 24 So. 314 (timidity or fear). See Bryant v. S. (Tex. Cr. App.), 47 S. W. 373.

[36] Cumming v. S. 99 Ga. 662, 27 S. E. 177.

[37] Thompson v. U. S. 157 U. S. 271, 15 Sup. Ct. 73.

[38] Allison v. U. S. 160 U. S. 203, 16 Sup. Ct. 252.

[39] Hughes v. P. 116 Ill. 330, 6 N. E. 55; Adams v. P. 47 Ill. 379; Kinney v. P. 108 Ill. 527; Crawford v. S. 112 Ala. 1, 21 So. 214; Hughes v. S. 117 Ala. 25, 23 So. 677; Welch v. S. 124 Ala. 41, 27 So. 306; Jackson v. Com. 98 Va. 845, 36 S. E. 487; S. v. Pennington, 146 Mo. 27, 47 S. W. 799; Mitchell v. S. (Tex. Cr. App.), 41 S. W. 816 (not entitled to instructions on manslaughter).

[40] Lewis v. S. 120 Ala. 339, 25 So. 43. An instruction that to entitle the defendant to an acquittal he must have been "entirely free from fault in bringing on the difficulty" is not improper, as the word "entirely" exacts no higher degree of fault than free from fault: Ellis v. S. 120 Ala. 333, 25 So. 1; Bell v. S. 115 Ala. 39, 22 So. 530; Crawford v. S. 112 Ala. 29, 21 So. 223. See Dennis v. S. 118 Ala. 72, 23 So. 1002.

subject is error.[41] But on the other hand, where there is evidence tending to show that the defendant was at fault, the court may, by proper instructions, submit the question to the jury.[42]

It follows that where the evidence is clear and undisputed that the defendant provoked the difficulty which resulted in the homicide, he is not entitled to have the jury instructed on the law of self-defense.[43]

Where there is no evidence to justify the killing of another, the court may properly refuse to instruct on the law of justification, although the evidence may be sufficient to reduce the charge from murder to manslaughter. For example, if a husband kill his wife while she is in the act of adultery, the law regards the provocation sufficient to reduce the crime from murder to manslaughter, but not sufficient to justify the homicide.[44]

§ 259. Defendant first in wrong, but abandons the conflict. If it appears from the evidence that the defendant, though originally in the wrong in bringing on the difficulty with the deceased, in good faith had abandoned the conflict and declined any further struggle, then in that case he would have the right to act in self-defense, and the court, on proper request, should not refuse to instruct the jury accordingly.[45] Thus an instruc-

[41] Cornelius v. Com. 23 Ky. L. R. 771, 64 S. W. 412; McCandless v. S. 42 Tex. Cr. App. 58, 57 S. W. 672; Grayson v. S. (Tex. Cr. App.), 57 S. W. 808; Stell v. S. (Tex. Cr. App.), 58 S. W. 75; Williams v. S. (Tex. Cr. App.), 69 S. W. 415; Com. v. Hoskins, 18 Ky. L. R. 59, 35 S. W. 284. See Winters v. S. 37 Tex. Cr. App. 582, 40 S. W. 303; Cooper v. S. 80 Miss. 175, 30 So. 579; Pollard v. S. (Tex. Cr. App.), 73 S. W. 953; Harris v. S. 36 Ark. 127.

[42] Ter. v. Gonzales (N. Mex.), 68 Pac. 928; Tate v. S. 35 Tex. Cr. App. 231, 33 S. W. 121; Carleton v. S. 43 Neb. 373, 61 N. W. 699 (circumstantial evidence will support such instruction). See Jackson v. S. 106 Ala. 12, 17 So. 333 (defendant killed a third person by mistake).

[43] Kilgore v. S. 124 Ala. 24, 27 So. 4. See Carleton v. S. 43 Neb. 373, 61 N. W. 699. See Mann v. S. 134 Ala. 1, 32 So. 704. See Longacre v. S. (Tex. Cr. App.), 41 S. W. 621.

[44] S. v. Cancienne 50 La. Ann. 847, 24 So. 134. But see Morrison v. S. 39 Tex. Cr. App. 519, 47 S. W. 369 (statute makes the killing justifiable); Giles v. S. 43 Tex. Cr. App. 561, 67 S. W. 411. Instructions in the following cases were held erroneous in not properly presenting the question of "free from fault" or who was at fault in bringing on the difficulty: Gibson v. S. (Miss.), 17 So. 892; Mosely v. S. 107 Ala. 74, 17 So. 932; P. v. Palmer, 105 Mich. 568, 63 N. W. 656; Linehan v. S. 113 Ala. 70, 21 So. 497; Bell v. S. 115 Ala. 25, 22 So. 526; S. v. Davis, 52 W. Va. 224, 43 S. E. 99; Hensen v. S. 114 Ala. 25, 22 So. 127.

[45] Young v. Com. 19 Ky. L. R. 929, 42 S. W. 1141; Stevenson v. U. S. 86 Fed. 106; P. v. Newcomer, 118

tion that "even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justifiable in self-defense," is proper.[46] An instruction unsupported by any evidence given on the assumption or theory that the defendant was originally in the wrong, and sought the deceased for the purpose of provoking a quarrel, and which ignores the plea of self-defense, is erroneous.[47]

§ 260. **Duty of defendant to retreat.**—In some jurisdictions the ancient doctrine prevails that the accused is bound to retreat and in good faith decline the combat, if he can, before he will be permitted to invoke the law of self-defense as a justification for killing another.[48] And where this doctrine is recognized as the law it is proper, in charging the jury, to instruct that the defendant must avoid the danger by flight, if he can, before he has the right to act in self-defense.[49]

But it is error to give such an instruction applying this rule to the defendant, if he was a peace officer at the time of the difficulty, acting in his official capacity;[50] and by the very latest expression of the supreme court of Illinois it has no application to any other person who is not in the wrong and is unlawfully attacked in a place where he has a right to be.[51]

Cal. 263, 50 Pac. 405; S. v. Higgerson, 157 Mo. 395, 57 S. W. 1014; Irvine v. S. 104 Tenn. 132, 56 S. W. 845. See S. v. Medlin, 126 N. Car. 1127, 36 S. E. 344; S. v. McCann, 16 Wash. 249, 47 Pac. 443, the evidence was that the defendant did not decline further struggle.

[46] P. v. Simons, 60 Cal. 72; P. v. Rush. 65 Cal. 129, 3 Pac. 590, 5 Am. Cr. R. 463.

[47] Bow v. S. 34 Tex. Cr. App. 481, 31 S. W. 170; S. v. Smith, 125 Mo. 2, 28 S. W. 181; Cline v. S. (Tex. Cr. App.), 28 S. W. 684. See Hammond v. P. 199 Ill. 173, 64 N. E. 980.

[48] Davison v. P. 90 Ill. 231; S. v. Spears, 46 La. Ann. 1524, 16 So. 467, 9 Am. Cr. R. 624; S. v. Rheams, 34 Minn. 18, 24 N. W. 302, 6 Am. Cr. R. 540; S. v. Warren, 1 Marv. (Del.), 487, 41 Atl. 190, 4 Blackstone Comm. 185.

[49] Stevens v. Com. 20 Ky. L. R. 544, 47 S. W. 229. Compare: S. v. Rolla, 21 Mont. 582, 55 Pac. 523. See, also, Scroggins v. S. 120 Ala. 369, 25 So. 180; Bell v. S. 115 Ala. 25, 22 So. 526. See Mann v. S. 134 Ala. 1, 32 So. 704; S. v. McCann, 16 Wash. 249, 49 Pac. 216; Gafford v. S. 122 Ala. 54, 25 So. 10 (assuming could not retreat).

[50] Lynn v. P. 170 Ill. 536, 48 N. E. 964.

[51] Hammond v. P. 199 Ill. 173, 64 N. E. 980; Miller v. S. 74 Ind. 1; Presser v. S. 77 Ind. 274; Story v. S. 99 Ind. 413; Plummer v. S. 135 Ind. 308, 34 N. E. 968; Page v. S. 141 Ind. 236, 40 N. E. 745. In the decision referred to we find the following language: "The ancient doc-

§ 261. Instructions when allegations and proof vary.—So where the evidence tends to show that the deceased may have met his death by other means than by the hands of the accused, as by suicide,[52] by accident,[53] at the hands of a third person without the aid or procurement of the accused,[54] or by a blow instead of by poisoning,[55] or that death was the result of a disease instead of the wound alleged, or operation on such wound,[56] the refusal of instructions properly presenting such defense is error.[57]

Thus where the evidence, though conflicting, tends to show that while the deceased was standing at the bar in a saloon, and on calling attention to a revolver lying on the back of the bar, the bar-keeper picked it up and, pointing it at the deceased, shot and killed him; that the revolver was accidentally discharged while handing it across the bar to show it to the deceased, and that the defendant and deceased had always been good friends, the giving of instructions as to intentional shooting and gross carelessness, and refusing to instruct as to whether or not the killing was accidental, is material error.[58]

trine of the common law that the right of self-defense does not arise until every effort to escape even to retreating until an impassable wall or something of that nature has been reached, has been supplanted in America by the doctrine that a man if unlawfully assaulted in a place where he has a right to be, and put in danger, real or reasonably apparent of losing his life, or receiving great bodily harm, is not required to endeavor to escape from his assailant, but may stand his ground and repel force with force, even to the taking of the life of his assailant, if necessary for the preservation of his own life or to protect himself from receiving great bodily harm," Hammond v. P. 199 Ill. 173, 64 N. E. 980. But where both parties are at fault neither can justify the taking of life without retreating, and the instruction should use this qualifying statement or its equivalent: Deal v. S. 140 Ind. 354, 39 N. E. 930; Deilks v. S. 141 Ind. 23, 40 N. E. 120.

[52] S. v. Kerns, 47 W. Va. 266, 34 S. E. 734; Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61; Garner v. S. (Tex. Cr. App.), 77 S. W. 798. See Com. v. Mudgett, 174 Pa. St. 211, 34 Atl. 588.

[53] Fitzgerald v. S. 112 Ala. 34, 20 So. 966; Wooten v. S. 99 Tenn. 189, 41 S. W. 813; Allison v. U. S. 160 U. S. 203, 16 Sup. Ct. 252. See S. v. Carey, 15 Wash. 549, 46 Pac. 1050.

[54] S. v. White, 10 Wash. 611, 39 Pac. 160; Sander v. S. 134 Ala. 74, 32 So. 654.

[55] Lewis v. Com. 19 Ky. L. R. 1139, 42 S. W. 1127.

[56] Garner v. S. (Tex. Cr. App.), 77 S. W. 798.

[57] P. v. Seaman, 107 Mich. 348, 65 N. W. 203, evidence that the deceased aborted from natural causes.

[58] Fitzgerald v. S. 112 Ala. 34, 20 So. 966; Wooten v. S. 99 Tenn. 189, 41 S. W. 813 (deceased fell). See Hayden v. Com. 20 Ky. L. R. 274, 45 S. W. 886 (no evidence of reckless or careless use of weapon). A charge that "if it is possible to account for the death of the de-

§ 262. **Instructions when arrest is unlawful.**—A person has a right to resist an unlawful arrest, and may defend himself against assaults made upon his person by an officer or other person seeking to arrest him illegally and without color of authority; and where the evidence tends to prove that the deceased was killed under such circumstances, the defendant is entitled to have the jury instructed on the law of self-defense.[59] Where the evidence tends to show that the accused did not know that his arrest was sought for a lawful purpose, an instruction on murder alleged to have been committed while resisting a lawful arrest is erroneous in omitting such knowledge.[60]

§ 263. **Killing mere trespasser.—Instructions.**—Mere trespass will not justify the taking of human life; such extreme measures cannot be resorted to for the purpose of removing a trespasser from one's premises. The giving of instructions, therefore, tending to lead the jury to believe that one may lawfully kill a trespasser is improper. Thus, where the killing was the result of the contentions of the accused and deceased as to the ownership and right to occupy a tract of land it is error for the court to instruct the jury as to the rights or claims of the contending parties to the land.[61] In another case where the homicide was the result of a dispute between the defendant and deceased, arising from the refusal of the former to shut a gate after passing through it, on a road extending through land owned by the father of the deceased, it was held error to instruct on the unlawfulness of passing through gates and leaving them open.[62]

§ 264. **Motive—Instructions.**—While it is always proper to show motive for the commission of the crime of murder, the prosecution is not bound to do so, motive not being an indis-

ceased on any reasonable hypothesis other than that of the guilt of the defendant" the jury should do so, renders it unnecessary to give an instruction on the theory as to whether the deceased may have met his death by a fall, S. v. Carey, 15 Wash. 549, 46 Pac. 1050.

[59] Hardin v. S. 40 Tex. Cr. App. 208, 49 S. W. 607; Hill v. S. 35 Tex. Cr. App. 371, 33 S. W. 1075; Lynch v. S. 41 Tex. Cr. App. 510, 57 S. W. 1130. See Murphy v. S. 36 Tex. Cr. App. 24, 35 S. W. 174.

[60] S. v. Phillips, 118 Iowa, 660, 92 N. W. 876. See, also, Plummer v. S. 135 Ind. 308, 34 N. E. 968.

[61] Utterback v. Com. 20 Ky. L. R. 1515, 49 S. W. 479. See Hughes Cr. Law, § 13.

[62] S. v. Vaughan, 22 Nev. 285, 39 Pac. 733.

pensable element of the crime; and the court, in charging the jury, may so instruct them.[63] But in the absence of an instruction having been given for the prosecution on the subject, the defendant is not entitled to instructions based on the absence of motive.[64] But where the court instructs for the prosecution that motive of the accused to commit the crime charged is not a necessary element of guilt, then the refusal to instruct for the defendant that the absence of a probable motive is a circumstance in favor of the accused, is error.[65]

An instruction that a motive is difficult to prove; that no one can lay bare the secrets of the mind; that there may have been a concealed motive, although impossible to prove, is improper as allowing the jury to imagine a motive.[66]

§ 265. **Mutual combat—Instructions.**—The giving of instructions on the law of mutual combat is proper where the evidence tends to prove a voluntary agreement to fight.[67] Thus, where it appears from the evidence that the defendant and prosecuting witness voluntarily fought with each other for the purpose of settling their disputes, an instruction as to mutual combat is proper in the trial of an assault with intent to kill, and it matters not who commenced the assault.[68] Also where the evidence shows that the defendant and deceased were in an altercation threatening to kill each other, and that each went his way and procured a weapon and they again met, and that the defendant then shot and killed the deceased, an instruction on the theory as to whether the defendant voluntarily engaged the deceased in deadly conflict is proper.[69] On the other hand, if there is no evidence tending to prove mutual combat, instructions on that theory are improper. Thus, where the evidence

[63] Hotema v. United States 186 U. S. 413, 22 Sup. Ct. 895; Wheeler v. S. 158 Ind. 687, 63 N. E. 975; S. v. Crabtree, 170 Mo. 642, 71 S. W. 127.

[64] S. v. Brown, 168 Mo. 449, 68 S. W. 568.

[65] S. v. Foley, 144 Mo. 600, 46 S. W. 733.

[66] P. v. Enwright, 134 Cal. 527, 66 Pac. 726.

[67] Harmanson v. S. (Tex. Cr. App.), 42 S. W. 995; Glover v. S. 105 Ga. 597, 31 S. E. 584; Roark v. S. 105 Ga. 736, 32 S. E. 125; Koller v. S. 36 Tex. Cr. App. 496, 38 S. W. 44. See Parks v. S. 105 Ga. 242, 31 S. E. 580; Red v. S. 39 Tex. Cr. App. 414, 46 S. W. 408; Davis v. S. 114 Ga. 104, 39 S. E. 906; S. v. Turner, 63 S. Car. 548, 41 S. E. 778; Dorsey v. S. 110 Ga. 331, 35 S. E. 651 (proper as to voluntary manslaughter).

[68] Wallis v. S. (Tex. Cr. App.), 40 S. W. 794.

[69] Koller v. S. 36 Tex. Cr. App. 496, 38 S. W. 44.

shows that the defendant was forced into a fight by the deceased against defendant's will, and that defendant was compelled to act in self-defense, such an instruction should not be given.[70]

Burglary and Larceny.

§ 265a. Possession of stolen property—Instructions.—In some jurisdictions where burglary and larceny have been committed at the same time by one and the same act, the person found in possession of the stolen property soon after the burglary without giving any reasonable explanation of how he came into possession of it, then such possession is prima facie proof that he committed the burglary as well as the larceny.[71] According to this principle it is proper to instruct the jury that "the possession of stolen property soon after the commission of a theft is prima facie evidence of the guilt of the person in whose possession it is found, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt."[72]

A charge that "where property has been stolen and recently thereafter the same or any part thereof is found in the possession of another, such person is presumed to be the thief, and if he fails to account for his possession of such property

[70] Maines v. S. 35 Tex. Cr. App. 109, 31 S. W. 667; Jordan v. S. 117 Ga. 405, 43 S. E. 747; Guerrero v. S. 39 Tex. Cr. App. 662, 47 S. W. 655.

[71] S. v. La Grange, 94 Iowa, 60, 62 N. W. 664; S. v. Ham, 98 Iowa, 60, 66 N. W. 1038; Magee v. P. 139 Ill. 140, 28 N. E. 1077; Langford v. P. 134 Ill. 444, 25 N. E. 1009; Smith v. P. 115 Ill. 17, 3 N. E. 733; S. v. Frahm, 73 Iowa, 355, 35 N. E. 451, 7 Am. Cr. R. 134; S. v. Wilson, 137 Mo. 592, 39 S. W. 80; S. v. Rivers, 68 Iowa, 611, 27 N. W. 781; Branson v. Com. 92 Ky. 330, 13 Ky. L. R. 614; P. v. Wood, 99 Mich. 620, 58 N. W. 638; Mangham v. S. 87 Ga. 549, 13 S. E. 558; Taylor v. Ter. (Ariz.), 64 Pac. 423. Contra: Dobson v. S. 46 Neb. 250, 64 N. W. 956. Contra, as to burglary: Porterfield v. Com. 91 Va. 801, 22 S. E. 352. See S. v. Bryant, 134 Mo. 246, 35 S. W. 597.

[72] Hughes Crim. Law, § 451, citing Keating v. P. 160 Ill. 483, 43 N. E. 724; Gunther v. P. 139 Ill. 526, 28 N. E. 1101; Comfort v. P. 54 Ill. 404; Campbell v. S. 150 Ind. 74; 49 N. E. 905; Gablick v. P. 40 Mich. 292, 3 Am. Cr. R. 244; S. v. Kelley, 57 Iowa, 644, 11 N. W. 635; S. v. Brady (Iowa), 97 N. W. 64; Brooks v. S. 96 Ga. 353, 23 S. E. 413, 10 Am. Cr. R. 136, and many other cases. See Hix v. P. 157 Ill. 382, 41 N. E. 862. Contra: White v. S. 21 Tex. App. 339, 17 S. W. 727; P. v. Chadwick, 7 Utah, 134, 25 Pac. 737; Harper v. S. 71 Miss. 202, 13 So. 882; Calloway v. S. 111 Ga. 832, 36 S. E. 63, and other cases.

in a manner consistent with his innocence this presumption becomes conclusive against him," is proper.[73]

The refusal to give the following instruction for the defendant, was held to be error, especially where an instruction on the same subject was given for the prosecution: "If the jury believe from the evidence that the defendant bought the property and paid for it, and his purchase was open and public, unconnected with any suspicious circumstances of guilt, that is a satisfactory account of his possession of the property, and removes all presumption of guilt growing out of his possesion thereof."[74]

§ 266. Presumption as to possession is one of fact.—But the presumption that the person found in possession of recently stolen property is the thief, is not a presumption of law, but one of fact. There is no legal rule on the subject; but much depends on the nature of the property stolen and the circumstances of each particular case. Such presumption establishes no legal rule, ascertains no legal test, defines no legal terms, measures no legal standard, bounds no legal limits.[75]

The possession of stolen property by the defendant soon after the burglary is a circumstance which the jury may consider, together with all the other evidence, in determining whether the defendant committed the burglary.[76] Hence an instruction that possession of recently stolen property is a strong criminating circumstance tending to show guilt, is erroneous. Such possession is only a fact to be considered with all the other evidence.[77]

[73] S. v. Kelly, 73 Mo. 608; S. v. Henry, 24 Kas. 460; Shepperd v. S. 94 Ala. 104, 10 So. 663; Com. v. McGorty, 114 Mass. 299; Campbell v. S. 150 Ind. 74, 49 N. E. 905.

[74] Jones v. P. 12 Ill. 259.

[75] Hughes Cr. Law, § 452, citing, Smith v. S. 58 Ind. 340, 2 Am. Cr. R. 375; S. v. Hodge, 50 N. H. 510, 3 Greenleaf Ev. §31; S. v. Jennett, 88 N. Car. 665; Stover v. P. 56 N. Y. 317; Bellamy v. S. 35 Fla. 242, 17 So. 560; Ingalls v. S. 48 Wis. 647, 4 N. W. 785; Jones v. S. 26 Miss. 247; S. v. Walker, 41 Iowa, 217, 1 Am. Cr. R. 433; P. v. Fagan, 66 Cal. 534, 6 Pac. 394, and other cases.

[76] Whitman v. S. 42 Neb. 841, 60 N. W. 1025; Porterfield v. Com. 91 Va. 801, 22 S. E. 352; S. v. Bliss, 27 Wash. 463, 68 Pac. 87; Johnson v. S. 148 Ind. 522, 47 N. E. 926; Campbell v. S. 150 Ind. 74, 49 N. E. 905.

[77] S. v. Bliss, 27 Wash. 463, 68 Pac. 87. On a charge of larceny an instruction as to the failure of the accused to explain his possession of the property alleged to have been stolen, is improper in the absence of any demand or request for such explanation, Moore v. S. (Tex. Cr. App.), 33 S. W. 980.

CHAPTER XIV.

INCLUDED CRIMINAL OFFENSES.

Sec.
267. Included offenses—Instructions.
268. If no evidence—Instructions properly refused.
269. Homicide—No evidence of included offenses.
270. Evidence supporting included offense—Instructions.
271. No evidence of manslaughter—Instructions.
272. Manslaughter — Instructions proper.
273. Involuntary manslaughter—Evidence wanting.
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§ 267. Included offenses—Instructions.—Where a defendant is charged with a crime which includes other offenses of an inferior degree, the law of each degree or included offense which the evidence tends to prove should be given to the jury by proper instructions, and the refusal to so instruct is error.[1] It is the duty of the court to so fully instruct the jury upon every degree and kind of crime of which the accused may be convicted, under the indictment, as to give him the benefit of having the evidence considered by the jury under a full knowledge of the law as to the essential characteristics of each kind and degree of crime for which a verdict may be returned against him.[2]

[1] Curtis v. S. 36 Ark. 284; P. v. Palmer, 96 Mich. 580, 55 N. W. 994; Brookins v. S. 100 Ga. 331, 28 S. E. 77; Guy v. S. 111 Ga. 648, 36 S. E. 857; S. v. Mize, 36 Kas. 187; S. v. Cunningham, 111 Iowa, 233, 82 N. W. 775; S. v. Rutherford, 152 Mo. 124, 53 S. W. 417; Picken v. S. 115 Ala. 42, 22 So. 551; Shaeffer v. S. 61 Ark. 241, 32 S. W. 679 (petit larceny included in grand larceny); Hughes Cr. Law, § 3248, citing S. v. Desmond, 109 Iowa, 72, 80 N. W. 214; S. v. Lucas, 124 N. Car. 825, 32 S. E. 962; S. v. Estep, 44 Kas. 572, 24 Pac. 986.

[2] Hughes Cr. Law, § 3243, citing S. v. Meyer, 58 Vt. 457, 3 Atl. 195, 7 Am. Cr. R. 435.

Slight evidence is sufficient upon which to base instructions embracing the law of inferior or included offenses, and it is the duty of the court to instruct thereon, notwithstanding the weakness of the testimony.[3] If the testimony of the defendant alone tends to prove an included offense, instructions should be given accordingly, although his testimony is at variance with that of all the other witnesses.[4]

Instructions which ignore or withdraw from the consideration of the jury an included offense are erroneous where the evidence tends to prove the included offense.[5]

Thus on a charge of robbery there being evidence tending to prove the included crime of larceny, the giving of instructions eliminating or withdrawing such included offense is error.[6] Also on a charge of felonious assault which includes simple assault or assault and battery, an instruction directing the jury to acquit if they are not satisfied beyond a reasonable doubt that the defendant is guilty of felonious assault is improper.[7]

§ 268. If no evidence.—Instructions properly refused.—Of couse, if there is no evidence whatever tending to prove an included offense the court may properly refuse to instruct thereon.[8] Thus, on a charge of assault with intent to kill, a failure to instruct on the law of the lesser or included offense of simple assault is not error where the evidence conclusively proves only the crime of assault with intent to kill or no offense at all.[9]

[3] S. v. Mize, 36 Kas. 187; Madison v. Com. 13 Ky. L. R. 313, 17 S. W. 164; S. v. Elliott, 98 Mo. 150, 11 S. W. 566.

[4] S. v. Banks, 73 Mo. 592; S. v. Palmer, 88 Mo. 568. But see S. v. Turlington, 102 Mo. 642, 15 S. W. 141.

[5] Dolan v. S. 44 Neb. 643, 62 N. W. 1090.

[6] P. v. Church, 116 Cal. 300, 48 Pac. 125.

[7] Fleming v. S. 107 Ala. 11, 18 So. 263; Jackson v. S. (Ala.), 18 So. 728.

[8] S. v. Lucas, 124 N. Car. 825, 32 S. E. 962; S. v. Sherman, 106 Iowa, 684, 77 N. W. 641; S. v. Murphy, 109 Iowa, 116, 80 N. W. 305; Brookins v. S. 100 Ga. 331, 28 S. E. 77; Parker v. S. 40 Tex. Cr. App. 119, 49 S. W. 80; S. v. Fruge, 106 La. 694, 31 So. 323.

[9] S. v. Barton, 142 Mo. 450, 44 S. W. 239; Barnes v. S. 39 Tex. Cr. App. 184, 45 S. W. 495; Harris v. S. (Tex. Cr. App.), 47 S. W. 643; Honeywell v. S. 40 Tex. Cr. App. 199, 49 S. W. 586 (aggravated assault); Ter. v. Gatliff (Okla.), 37 Pac. 899; S. v. Alcom, 137 Mo. 121, 38 S. W. 548; S. v. Johnson, 129 Mo. 26, 31 S. W. 339; S. v. Woods, 124 Mo. 412, 27 S. W. 1114; P. v. Lopez, 135 Cal. 23, 66 Pac. 965; Wilson v. S. (Tex. Cr. App.), 73 S. W. 964 (aggravated assault); Duval v. S. (Tex. Cr. App.), 70 S. W. 543 (aggravated assault).

Where on a charge of malicious assault with intent to kill, as defined by statute, the defendant may be convicted of assault with intent to kill without malice, as defined by another section of the statute, an instruction is not defective in omitting to state the law on malicious or felonious intent.[10] Also, if a serious injury be inflicted by means of a deadly weapon it is proper to refuse an instruction on simple assault which is included in a charge of malicious assault with a deadly weapon.[11] Likewise where the evidence clearly establishes the guilt of the accused on a charge of assault with intent to maim, it is not error to refuse to instruct on assault and battery.[12]

On a charge of robbery if there is no evidence that the crime may have been larceny instead of robbery, a failure to instruct as to larceny is not error.[13]

Also under an indictment for rape where the evidence conclusively proves that crime, the court may properly refuse to instruct as to the law of assault with intent to commit rape.[14] But under a statute providing that the court shall instruct the jury as to the law of assault, or assault and battery, on a charge of assault with intent to kill, it is error to refuse to so instruct.[15]

§ 269. Homicide—No evidence of included offenses.—In a homicide case where the evidence shows that the defendant is guilty of murder in the first degree, or not guilty of any offense, instructions requested on any of the lower degrees, or on manslaughter, which are included in the indictment, are properly refused.[16] The evidence having no tendency to prove any

[10] S. v. Grant, 144 Mo. 56, 45 S. W. 1102.

[11] S. v. Drumm, 156 Mo. 216, 56 S. W. 1086; Brantley v. S. 9 Wyo. 102, 61 Pac. 139; Ford v. S. (Tex. Cr. App.), 56 S. W. 338; S. v. Higgerson, 157 Mo. 395, 57 S. W. 1014; Martinez v. S. (Tex. Cr. App.), 56 S. W. 580; P. v. Stanton, 106 Cal. 139, 39 Pac. 525. Contra: S. v. Desmond, 109 Iowa, 72, 80 N. W. 214.

[12] S v. Akin, 94 Iowa, 50, 62 N. W. 667; Duval v. S. (Tex. Cr. App.), 70 S. W. 543.

[13] S. v. Reasby, 100 Iowa, 231, 69 N. W. 451.

[14] P. v. Chavez, 103 Cal. 407, 37 Pac. 389; Paynter v. Com. 21 Ky. L. R. 1562, 55 S. W. 687; P. v. Harris, 103 Mich. 473, 61 N. W. 871; Bryant v. S. 114 Ga. 861, 40 S. E. 995 (assault with intent to rape). See, also, S. v. Courtemarsh, 11 Wash. 446, 39 Pac. 955; Young v. Com. 16 Ky. 496, 29 S. W. 439.

[15] S. v. Dolan, 17 Wash. 499, 50 Pac. 472. See P. v. Demasters, 105 Cal. 669, 39 Pac. 35.

[16] S. v. Kornstett, 62 Kas. 221, 61 Pac. 805: Ragland v. S. 125 Ala. 12, 27 So. 983; S. v. Vinso, 171 Mo. 576, 71 S. W. 1034; Cook v. S. (Fla.), 35 So. 671 (third degree); S. v. Meadows, 156 Mo. 110, 56 S. W. 878; Reed v. Com. 98 Va. 817,

other offense than murder in the first degree, the court, in charging the jury, may restrict them to that crime.[17]

In Ohio it has been held error to instruct the jury on the law of murder in the second degree and on manslaughter, where the evidence has a tendency to prove only murder in the first degree, or no crime at all.[18] Where the evidence tends to prove murder of the first degree, an instruction that the jury could not convict of that degree is properly refused.[19] So where there is no evidence tending to prove murder in the second degree, instructions as to that crime may be refused.[20]

36 S. E. 399; Cannon v. S. 41 Tex. Cr. App. 467, 56 S. W. 351; Henry v. S. (Tex. Cr. App.), 30 S. W. 802; Gafford v. S. 125 Ala. 1, 28 So. 406; McGrath v. S. 35 Tex. Cr. App. 413, 34 S. W. 127; Hays v. S. (Tex. Cr. App.), 57 S. W. 835; O'Brien v. Com. 89 Ky. 354, 11 Ky. L. R. 534, 12 S. W. 471; Baker v. S. 111 Ga. 141, 36 S. W. 607; Robinson v. S. 84 Ga. 674, 11 S. E. 544; Waller v. S. 110 Ga. 250, 34 S. E. 212; S. v. Calder, 23 Mont. 504, 59 Pac. 903; S. v. Hicks, 125 N. Car. 636, 34 S. E. 247; Stoball v. S. 116 Ala. 452, 23 So. 162; Clarke v. S. 117 Ala. 1, 23 So. 671; S. v. Musick, 101 Mo. 260, 14 S. W. 212; Wilkerson v. S. (Tex. Cr. App.), 7 S. W. 956; S. v. Van Tassel, 103 Iowa, 6, 72 N. W. 497; S. v. Albright, 144 Mo. 638, 46 S. W. 620; Hart v. S. (Tex. Cr. App.), 44 S. W. 1105; Navarro v. S. (Tex. Cr. App.), 43 S. W. 105; Dancy v. S. (Tex. Cr. App.), 46 S. W. 247; S. v. Smith, 102 Iowa, 656, 72 N. W. 279; Meyers v. S. 39 Tex. Cr. App. 500, 46 S. W. 817; S. v. Tomasitz, 144 Mo. 86, 45 S. W. 1106; Riddle v. S. (Tex. Cr. App.), 46 S. W. 1058; Greer v. S. (Tex. Cr. App.), 45 S. W. 12; P. v. Fellows, 122 Cal. 233, 54 Pac. 830; P. v. Chaves, 122 Cal. 134, 54 Pac. 596; P. v. Fuhrmann, 103 Mich. 593, 61 N. W. 865; Prewett v. S. 41 Tex. Cr. App. 262, 53 S. W. 879; P. v. Repke, 103 Mich. 459, 61 N. W. 801; Davis v. United States 165 U. S. 373, 17 Sup. Ct. 360. See Sparf v. United States 156 U. S. 51, 15 Sup. Ct. 273; Johnson v. S. (Tex. Cr. App.), 58 S. W. 105; Holloway v. S. 156 Mo. 222, 56 S. W. 734; S. v. Jackson, 103 Iowa, 702, 73 N. W. 467; Sandoval v. Ter. 8 N. Mex. 573, 45 Pac. 1125; Aguilar v. Ter. 8 N. Mex. 496, 46 Pac. 342; S. v. Punshon, 124 Mo. 448, 27 S. W. 1111; Jahnke v. S. (Neb.), 94 N. W. 158; S. v. Young, 67 N. J. L. 223, 57 Atl. 939; S. v. Dixon, 131 N. Car. 808, 42 S. E. 944; P. v. Beverly, 108 Mich. 509, 66 N. W. 379; S. v. Harlan, 130 Mo. 381, 32 S. W. 997; S. v. Finley, 118 N. Car. 1161, 24 S. E. 495; S. v. Covington, 117 N. Car. 834, 23 S. E. 337; Hunt v. S. 135 Ala. 1, 33 So. 329. No evidence tending to reduce from murder to manslaughter. Sparf v. United States 156 U. S. 51, 10 Am. Cr. R. 215, 15 Sup. Ct. 273; P. v. McNut, 93 Cal. 658, 29 Pac. 243; Clark v. Com. 123 Pa. St. 555, 16 Atl. 795; McClernan v. Com. 11 Ky. L. R. 301, 12 S. W. 148.

[17] Cupps v. S. (Wis.), 97 N. W. 217.

[18] Dresback v. S. 38 Ohio St. 369. See Adams v. S. 29 Ohio St. 414.

[19] S. v. Barrett, 132 N. Car. 1005, 43 S. E. 832. In this connection it must not be forgotten that where the jury are authorized by statute to determine the degree of guilt, the court cannot by instruction say to the jury that if certain enumerated facts are established beyond a reasonable doubt the defendant is guilty of murder, it being the province of the jury to determine the degree of guilt if the accused is guilty of any offense. See cases cited under § 251.

[20] Beard v. S. 41 Tex. Cr. App. 173, 53 S. W. 348; S. v. Baker, 146

The court is not bound to instruct on any included degree of murder where there is no evidence tending to prove such included crime; especially is this true if the party complaining makes no request for such instructions.[21] Thus, for example, where the evidence shows that a husband, charging his wife in the grossest terms with improper conduct, struck her and shot her to death, without provocation, while she was pleading for mercy, and then seized and shot his child, he was not entitled to instructions on murder in the second degree.[22] So under an indictment charging murder while in the act of committing rape, an instruction charging that murder in the second degree and manslaughter are not included in such charge, and that in case the accused is convicted the verdict should be for murder in the first degree, is proper.[23]

The killing of a person while the accused is attempting to commit the crime of robbery is murder, as defined by statute in some of the states; and an instruction on murder in the second degree in such case may be refused.[24] In charging the jury as to the law of murder under such circumstances it is not necessary to define robbery.[25]

§ 270. Evidence supporting included offense—Instructions. If the evidence, though circumstantial, tends to support the charge of murder in the second as well as the first degree, it is error to refuse instructions as to the law of murder in the second degree.[26] Thus, where the evidence discloses that the deceased

Mo. 379, 48 S. W. 475 (facts stated); Swan v. S. 39 Tex. Cr. App. 531, 47 S. W. 362; Leslie v. S. (Tex. Cr. App.), 49 S. W. 73; S. v. Bronstine, 147 Mo. 520, 49 S. W. 512. By statute of Louisiana the jury should be instructed that there is no crime known as "murder in the second degree," but that the jury may find the accused guilty of manslaughter, S. v. Jones, 46 La. Ann. 1395, 16 So. 369.

[21] S. v. Meadows, 156 Mo. 110, 56 S. W. 878; Gafford v. S. 125 Ala. 1, 28 So. 406. See P. v. Worden, 113 Cal. 569, 45 Pac. 844.

[22] S. v. Duestrow, 137 Mo. 44, 38 S. W. 554.

[23] Morgan v. S. 51 Neb. 672, 71 N. W. 788.

[24] S. v. Saxton, 147 Mo. 89, 48 S. W. 452; Aiken v. Com. 24 Ky. L. R. 523, 68 S. W. 849; S. v. Young, 67 N. J. L. 223, 51 Atl. 939 (killing while committing burglary). See Wilkins v. S. 35 Tex. Cr. App. 525, 34 S. W. 627.

[25] Ransom v. S. (Tex. Cr. App.), 70 S. W. 960.

[26] Fisher v. S. 23 Mont. 540, 59 Pac. 919; Guerrero v. S. 41 Tex. Cr. App. 161, 53 S. W. 119; Lancaster v. S. (Tex. Cr. App.), 31 S. W. 515; S. v. O'Reilly, 126 Mo. 597, 29 S. W. 577; S. v. Bryant, 55 Mo. 75, 2 Green Cr. R. 612.

was found dead in his wagon, his face cut and battered, and an ax was found in his wagon with blood on it, and that some flour had been taken out of the wagon, but there being no evidence as to how or under what circumstances the killing was done, it was held error to instruct only on murder in the first degree. The court, under the circumstances, should have also instructed on the lower degrees.[27] Also where it appears from the evidence that the defendant and the deceased had had trouble in their business affairs; that the defendant followed the deceased with a rifle, who had gone up a certain trail; that soon after this a shot was heard, after which the defendant was seen returning and that the deceased was found dead from a rifle bullet, a failure to instruct as to the lower degree of murder was held error, it being for the jury to determine the degree of the homicide in the event of a conviction.[28] And in some jurisdictions the court should instruct as to the lower degree, whether requested to do so or not, where the evidence warrants the giving of such instructions.[29] And the court should instruct on murder in the second degree where the evidence is entirely circumstantial no one knowing how the killing was done.[30]

In Kentucky the court should instruct as to the law of murder, manslaughter and justifiable homicide in case the evidence is wholly circumstantial.[31] In Utah it has been held proper to instruct as to all the degrees of murder, no matter whatever may be the evidence.[32]

§ 271. No evidence of manslaughter—Instructions.—Where there is no evidence whatever tending to prove manslaughter in any degree as defined by statute, the court may properly refuse to instruct as to such included crimes.[33] And if there is no evidence whatever tending to prove manslaughter, the

[27] Aguilar v. Ter. 8 N. Mex. 496, 46 Pac. 342.

[28] Ter v. Padilla, 8 N. Mex. 510, 46 Pac. 346.

[29] Ter. v. Friday, 8 N. Mex. 204, 42 Pac. 62; Ter. v. Vialpando, 8 N. Mex. 211, 42 Pac. 64.

[30] Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61; Lancaster v. S. (Tex. Cr. App.), 31 S. W. 515; Aiken v. Com. 24 Ky. L. R. 523, 68 S. W. 849.

[31] Ratchford v. Com. 16 Ky. L. R. 411, 28 S. W. 499.

[32] P. v. Thiede, 11 Utah, 241, 39 Pac. 837.

[33] S. v. Brown, 145 Mo. 680, 47 S. W. 789; S. v. Baker, 146 Mo. 379, 48 S. W. 475 (facts); S. v. Kindred, 148 Mo. 270, 49 S. W. 845; Mills v. S. 104 Ga. 502, 30 S. E. 778; Fuller v. S. (Tex. Cr. App.), 48 S. W. 183; Hatcher v. S. 43 Tex. Cr. App. 237, 65 S. W. 97; Howard v.

court may properly instruct the jury that the evidence does not warrant a verdict of that crime.[34] So where the evidence tends to prove murder the defendant cannot insist on limiting the instructions to manslaughter.[35]

If the evidence shows that the defendant is either guilty of murder, or that he is entitled to be acquitted on the ground of self-defense, then it is improper to instruct the jury on the law of manslaughter.[36] Where the evidence does not show that the homicide was the result of a sudden quarrel, or that there was any reasonable or lawful provocation for the killing, the accused is not entitled to have the jury instructed on any of the degrees of manslaughter.[37] And the court need not instruct on manslaughter where the evidence proves either the crime of murder while in the act of committing robbery, or where the evidence shows self-defense.[38] In a case where the defense was insanity, the court having, at the request of counsel for the accused, instructed on the law of that defense, and the court having also given the statutory definitions of murder and manslaughter, it was held not to be error to refuse an instruction on manslaughter, though correct as an abstract proposition of law.[39] Or the defense being insanity, and the accused was either absolutely insane or not at all, instructions as to the law of murder of the second degree may be refused.[40]

§ 272. **Manslaughter—Instructions proper.**—But if there is any evidence having a tendency to support the included crime of manslaughter it is error to refuse to instruct the jury as to the law of manslaughter.[41] If a person, while resisting an il-

S. 115 Ga. 244, 41 S. E. 654; S. v. Diller, 170 Mo. 1, 70 S. W. 139; S. v. Gurley, 170 Mo. 429, 70 S. W. 875; S. v. Hall, 168 Mo. 475, 68 S. W. 344.

[34] Genz v. S. 58 N. J. L. 482, 34 Atl. 816.

[35] S. v. Tighe, 27 Mont. 327, 71 Pac. 3.

[36] Franklin v. S. 34 Tex. Cr. App. 625, 31 S. W. 643; May v. S. 94 Ga. 76; 20 S. E. 251.

[37] S. v. May, 172 Mo. 630, 72 S. W. 918.

[38] Little v. S. 39 Tex. Cr. App. 654, 47 S. W. 984.

[39] Reighard v. S. 22 Ohio C. C. 340.

[40] Jarvis v. S. 70 Ark. 613, 67 S. W. 76.

[41] Horton v. S. 110 Ga. 739, 35 S. E. 659; Dorsey v. S. 110 Ga. 331, 35 S. E. 651 (mutual combat); S. v. Lucey, 24 Mont. 295, 61 Pac. 994; Folks v. S. (Tex. Cr. App.), 58 S. W. 98; Sumner v. S. 109 Ga. 142, 34 S. E. 293; Hollingsworth v. S. 156 Mo. 178, 56 S. W. 1087; Beckham v. S. (Tex. Cr. App.), 69 S. W. 534; Stevenson v. U. S. 162 U. S. 313, 16 Sup. Ct. 839; Compton v. S. 110 Ala. 24, 20 So. 119; S. v. Weak-

legal arrest, kill the officer who thus seeks to arrest him, the crime is usually manslaughter, and not murder. In such case the accused is entitled to have the jury fully instructed on the law of manslaughter.[42]

Where it appears from the evidence that while the deceased and the defendant were having an altercation, the deceased struck the defendant in the mouth; that they were then separated, and that soon afterwards the deceased approached the defendant apparently intending to assault him; and that the evidence was conflicting as to whether he did assault or strike the defendant, an instruction on manslaughter under such state of facts is proper.[43] So under an indictment charging murder by the administration of poison, evidence of the general reputation of the defendant for peace and good order which tends to raise a reasonable doubt as to the criminal intent, is sufficient foundation for the giving of instructions as to the included crime of manslaughter.[44] So, also, if the evidence tends in any manner to establish the crime of voluntary manslaughter, then an instruction as to that offense is proper.[45]

§ 273. Involuntary manslaughter—Evidence wanting.—Where the evidence shows that the homicide was either murder in the first degree or the second degree, or that the killing was done in self-defense, the court may properly refuse instructions as to the crime of voluntary manslaughter.[47] But where no one

ly (Mo.), 77 S. W. 527 (fourth degree); Pollard v. S. (Tex. Cr. App.), 73 S. W. 953; Gardner v. S. (Tex. Cr. App.), 73 S. W. 13; Riptoe v. S. (Tex. Cr. App.), 42 S. W. 381; Brande v. S. (Tex. Cr. App.), 45 S. W. 17; Hudson v. S. 101 Ga. 520, 28 S. E. 1010; Horton v. S. 110 Ga. 739, 35 S. E. 659; Fendrick v. S. 39 Tex. Cr. App. 147, 45 S. W. 589; Reddick v. S. (Tex. Cr. App.), 47 S. W. 993; Franklin v. S. (Tex. Cr. App.), 48 S. W. 178 (facts); S. v. Grugin, 147 Mo. 39, 47 S. W. 1058. 42 L. R. A. 774; Garrison v. S. 147 Mo. 548, 49 S. W. 508; S. v. Dyer, 139 Mo. 199, 40 S. W. 768; S. v. Shadwell, 26 Mont. 52, 66 Pac. 508; Hooper v. S. (Tex. Cr. App.), 69 S. W. 149.

[42] Lynch v. S. 41 Tex. Cr. App. 510, 57 S. W. 1130; Mooney v. S. (Tex. Cr. App.), 65 S. W. 926. See Manger v. S. (Tex. Cr. App.), 69 S. W. 145. Contra: S. v. Edwards, 126 N. Car. 1051, 35 S. E. 540; Com. v. Grether, 204 Pa. 203, 53 Atl. 753.

[43] Castra v. S. (Tex. Cr. App.), 40 S. W. 985.

[44] S. v. Ellsworth, 30 Ore. 145, 47 Pac. 199.

[45] Horton v. S. 110 Ga. 739, 35 S. E. 659; Hatcher v. S. 116 Ga. 617, 42 S. E. 1018.

[47] Gafford v. S. 125 Ala. 1, 28 So. 406; Baker v. S. 111 Ga. 141, 36 S. E. 607; Parks v. S. 105 Ga. 242, 31 S. E. 580; Pugh v. S. 114 Ga. 16, 39 S. E. 875. See Hollingsworth v. S. 156 Mo. 178, 56 S. W. 1087.

saw the homicide, instructions should be given on all the degrees; also on manslaughter.[48] Likewise where the evidence tends to support manslaughter of the first degree only, or no offense, the instructions may be confined accordingly.[49]

The accused is not entitled to instructions as to the law of involuntary manslaughter where the evidence shows an intentional killing without provocation or justification, although he in his own behalf may state that the killing was accidental.[50] And where the evidence shows the case to be either murder or voluntary manslaughter, and there is no evidence whatever tending to establish involuntary manslaughter, it is not necessary to give instructions defining the latter crime, for to do so would be directing the attention of the jury to a principle of law not applicable to the facts of the case, having a tendency to confuse rather than to enlighten the jury on the issues.[51] And on the same principle where the evidence shows that the accused is guilty of either murder or manslaughter, he cannot insist on instructions as to any included offense lower in degree than manslaughter.[52]

§ 274. Instructions must be requested.—The failure of the court to instruct on the lesser or included offense is not error in the absence of a request for such instructions.[53] So if instructions on manslaughter are not requested there can be no ground for complaint that the court did not instruct as to that crime.[54] In the absence of a request for more specific instructions as to the included crime of manslaughter there is no ground for complaint in that respect, the court having charged the jury in the language of the statute relating to manslaughter.[55] Or under an indictment for an attempt to commit rape the defendant must

[48] Aiken v. Com. 24 Ky. L. R. 523, 68 S. W. 849.

[49] P. v. De Garmo, 76 N. Y. S. 477, 73 App. Div. 46.

[50] Ewatt v. S. 100 Ga. 80, 25 S. E. 846.

[51] Davis v. P. 114 Ill. 86, 97, 29 N. E. 192; S. v. Dettmer, 124 Mo. 426, 27 S. W. 1117; Ragsdale v. S. 134 Ala. 24, 32 So. 674.

[52] S. v. Tippet, 94 Iowa, 646, 63 N. W. 445.

[53] P. v. Barney, 114 Cal. 554, 47 Pac. 41; Reynolds v. S. 147 Ind. 3, 46 N. E. 31; Miller v. P. 23 Colo. 95, 46 Pac. 111; Odette v. S. 90 Wis. 258, 62 N. W. 1054; Barr v. S. 45 Neb. 458, 63 N. W. 856; P. v. Arnold, 116 Cal. 682, 48 Pac. 803.

[54] Allen v. S. (Tex. Cr. App.), 70 S. W. 85; Tillery v. S. 99 Ga. 209, 25 S. E. 170, the court is not required to instruct on its own motion.

[55] Hanye v. S. 99 Ga. 212, 25 S. E. 307.

request instructions on the included offense of simple assault if he wishes the jury to consider that offense.[56] Likewise on a charge of robbery, if the accused fails to ask instructions on the included crime of larceny he cannot complain of error that the court failed to instruct on larceny.[57] That the court failed to call the attention of the jury to the fact that the defendant surrendered himself after killing the deceased cannot be complained of as error, no instruction having been requested on that point.[58] And there is no error for a failure to charge as to the punishment for murder, whether by death or by punishment in the penitentiary, in the absence of a request for such an instruction.[59]

[56] P. v. Barney, 114 Cal. 554, 47 Pac. 41.

[57] Miller v. P. 23 Colo. 95, 46 Pac. 111.

[58] Boston v. S. 94 Ga. 590, 21 S. E. 603.

[59] S. v. Cobbs, 40 W. Va. 718, 22 S. E. 310. An instruction which states the punishment for each grade of the different offenses is sufficient if it describes or defines each grade in such manner that the jury may clearly understand which particular offense is referred to in the instructions, Clark v. Com. 18 Ky. L. R. 758, 38 S. W. 489. The giving of instructions on murder in the first degree is harmless error where under a fair charge to the jury the defendant is convicted of murder in the first degree, S. v. Alfray, 124 Mo. 393, 27 S. W. 1097. See Gonzales v. S. 35 Tex. Cr. App. 33, 29 S. W. 1091. And the giving of instructions as to the law of murder in the second degree where the evidence shows murder only in the first degree, is not error, Johnson v. S, (Tex. Cr. App.), 4 S. W. 901. Nor is it error to instruct on the law of manslaughter when there is no evidence tending to prove that crime, Goodwin v. S. (Tex. Cr. App.), 46 S. W. 226, See S. v. Cunningham, 111 Iowa, 233, 82 N. W. 775.

CHAPTER XV.

DEFINITION OF OFFENSES.

Sec.
275. Statutory offenses — Instructions defining.
276. Elements omitted.
277. Enumerating elements of offense.
278. Deadly weapon defined.

§ 275. Statutory offenses—Instructions defining.—The court, in charging the jury, may give the statutory definition of the offense with which the accused is charged, in the exact words of the statute;[1] but the court is not bound to do so.[2] If the instructions embody all the essential elements of the crime charged that is sufficient without an instruction giving the statutory definition.[3] But a departure from the statutory words in defining a criminal offense or some element thereof in giving instructions, is error, unless the words used are equivalent in meaning to the statutory words defining the offense. Thus, "ordinary temper and courage" are not of the same meaning as the statutory words "ordinary temper."[4] And instructions in the language of the statute defining a crime are proper, although some of the modes of committing the offense as defined may not be involved in the case.[5]

[1] Duncan v. P. 134 Ill. 110, 24 N. E. 765; Shaw v. S. 102 Ga. 660, 29 S. E. 477; Long v. S. 23 Neb. 33, 36 N. W. 310.

[2] Carroll v. S. 53 Neb. 431, 73 N. W. 939.

[3] Adkins v. S. 41 Tex. Cr. App. 577, 56 S. W. 63; Williams v. S. 38 Tex. Cr. App. 144, 41 S. W. 626; Long v. S. 23 Neb. 33, 36 N. W. 310.

[4] Gardner v. S. 40 Tex. Cr. App. 19, 48 S. W. 170; Hardy v. S. 36 Tex. Cr. App. 400, 37 S. W. 434; Currier v. S. 157 Ind. 114, 60 N. E. 1023, where the jury is not charged with determining what penalty shall be imposed in case the defendant is found guilty the instructions need not state the penalty.

[5] P. v. Chaves, 122 Cal. 134, 54 Pac. 596; Sparks v. S. 34 Tex. Cr. App. 86, 29 S. W. 264; P. v. Mills, 143 N. Y. 383, 38 N. E. 456; P. v. Hughson, 154 N. Y. 153, 47 N. E.

§ 276. **Elements omitted.**—The omission of a material element of an offense in charging the jury on the definition thereof is error. For example, in defining perjury the omission from the instruction of the words "wilfully and corruptly" renders the instruction erroneous.[6] Or in a larceny case omitting from an instruction the element of the value of the property alleged to have been stolen renders the instruction defective, the value being an essential element of the offense charged.[7] An instruction intended as a definition of larceny is fatally defective if it omits the word "stealing."[8] Also an instruction defining larceny is fatally defective if it omits the element of criminal intent.[9]

So an instruction which attempts to state facts and circumstances constituting the crime of assault with intent to kill, is erroneous if it omits the element of criminal intent.[10] Or an instruction on receiving stolen property, which omits the intent and purpose with which the property was received is erroneous.[11] Or on a trial for forgery an instruction stating that if the defendant wrote the order introduced in evidence, or procured it to be written, is erroneous, in that it omits the element, "with intent to defraud."[12] Or in an instruction intended to state the essential elements of murder in the first degree if the words "with malice aforethought" be omitted it is erroneous.[13] So where one portion of a charge does not properly or sufficiently state the essential elements of the crime, the error will not be corrected although a full or correct statement of the law may be given in other portions of the charge.[14]

1002. Contra: Whitcomb v. S. 30 Tex. Cr. App. 269, 17 S. W. 258; Simons v. S. (Tex. Cr. App.), 34 S. W. 619.

[6] S. v. Higgins, 124 Mo. 640, 28 S. W. 178; Hix v. P. 157 Ill. 382, 41 N. E. 862.

[7] Collins v. P. 39 Ill. 233, 239.

[8] Hix v. P. 157 Ill. 383, 41 N. E. 862.

[9] S. v. Lockland, 136 Mo. 26, 37 S. W. 812; S. v. Coy, 119 N. Car. 901, 26 S. E. 120; P. v. Hendrickson, 46 N. Y. S. 402, 18 App. Div. 404. See Key v. S. 37 Tex. Cr. App. 511, 40 S. W. 296; Beabont v. S. 37 Tex. Cr. App. 515, 40 S. W. 405.

[10] Reed v. S. 76 Miss. 211, 24 So. 312, 43 L. R. A. 423. See Henry v. S. (Tex. Cr. App.), 49 S. W. 96.

[11] Goldsberry v. S. (Neb.), 92 N. W. 906.

[12] Agee v. S. 113 Ala. 52, 21 So. 207; Sledge v. S. 99 Ga. 684, 26 S. E. 756.

[13] S. v. Shafer, 22 Mont. 17, 55 Pac. 526; Tutt v. Com. 20 Ky. L. R. 492, 46 S. W. 675; Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61; Burton v. S. 107 Ala. 108, 18 So. 284. See Bunnell v. Com. 17 Ky. L. R. 106, 30 S. W. 604, omitting the word "feloniously" in defining murder is not material error.

[14] Mells v. U. S. 164 U. S. 644, 17 Sup. Ct. 210.

§ 277. **Enumerating elements of offense.**—An instruction which recites all the essential elements or facts necessary to constitute the crime of assault with intent to commit murder, and which states that if the jury believe that such facts have been proved beyond a reasonable doubt the defendant is guilty of assault with intent to commit murder, is proper.[15] An instruction designed as a definition of voluntary manslaughter stating that, if the defendant took the life of the deceased as charged in the indictment, he is guilty, is not objectionable in omitting the word "unlawfully" before the word "took" where the indictment properly charges the unlawful and felonious killing.[16]

In a homicide case an instruction stating that if the defendant administered poison to his wife and she partook of it and died from its effects, that is sufficient to establish all the elements of the crime, is not erroneous where it does not appear from the evidence that he gave her the drug as a medicine to benefit her.[17] Also charging that if the jury believe from the evidence that the defendant drew his pistol, and went to the deceased and struck him with his fist and then shot and killed him, they might from these facts infer that the defendant killed the deceased wilfully and with malice aforethought, properly states the law.[18]

And under the statute of New York an instruction which properly defines murder in the first degree, is not rendered erroneous by embodying in it other provisions of the statute relating to homicide having no bearing on the case, if the jury are properly instructed that a premeditated design to kill must be shown in order to warrant a conviction.[19] Under the statute of Missouri an instruction stating that if the jury believe from the evidence beyond a reasonable doubt that the defendant wilfully, premeditatedly and of his malice aforethought, shot and killed the deceased, but without deliberation, they should convict him of murder of the second degree, correctly states the law.[20]

[15] Crowell v. P. 190 Ill. 508, 514, 60 N. E. 872.

[16] Shields v. S. 149 Ind. 395, 49 N. E. 357.

[17] S. v. Van Tassel, 103 Iowa, 6, 72 N. W. 497.

[18] Allen v. United States 164 U. S. 492, 17 Sup. Ct. 154.

[19] P. v. Hughson, 154 N. Y. 153, 47 N. E. 1092. See S. v. Anderson, 10 Ore. 448. See Simons v. S. (Tex. Cr. App.), 34 S. W. 619. See, "Statutory Instructions."

[20] S. v. Bauerle, 145 Mo. 1, 46 S. W. 609. See Sullivan v. S. 100 Wis. 283, 75 N. W. 956.

§ 278. **Deadly weapon defined.**—Any instrument which is likely to produce death or serious bodily injury from the manner in which it is used is a proper definition of a deadly weapon.[21] A charge which defines a deadly weapon to be "anything with which death may be easily and readily produced," regardless of the purpose for which it was made, or whether it was made or not, is not improper.[22] An instruction stating that a certain instrument is a dangerous weapon is improper as invading the province of the jury.[23] The definition of "deadly weapon" need not be repeated in different instructions when once given.[24]

[21] Hardy v. S. 36 Tex. Cr. App. 400, 37 S. W. 434; Acers v. U. S. 164 U.S. 388, 17 Sup. Ct. 91; Mikel v. S. (Tex. Cr. App.), 68 S. W. 512; Tollet v. S. (Tex. Cr. App.), 55 S. W. 335.

[22] Acers v. U. S. 164 U. S. 388, 17 Sup. Ct. 91.

[23] Doering v. S. 49 Ind. 56.

[24] S. v. Smith, 164 Mo. 567, 65 S. W. 270 (billiard cue).

CHAPTER XVI.

CRIMINAL INTENT.

Sec.
279. Intent inferred from acts and words.
280. On evidence disproving intent.
281. Drunkenness disproving intent.
282. Malice and malice aforethought.
283. On inferring malice—Improper.

§ 279. Intent inferred from acts and words.—Every sane man is presumed to intend the natural and probable consequences of his acts, and it has been uniformly held, therefore, that the intent to commit a criminal offense may be inferred from the acts, words or declarations of the person accused, as well as from the manner and circumstances of the act committed,[1] and the court in charging the jury may instruct them accordingly.[2] Thus an instruction that the defendant is presumed to intend all the natural, probable and usual consequences of his acts is proper, especially when the act is committed voluntarily and wilfully.[3]

[1] Crosby v. P. 137 Ill 336, 27 N. E. 49; Fitzpatrick v. P. 98 Ill. 269; S. v. Kortgaard, 62 Minn. 7, 64 N. W. 51; Weaver v. P. 132 Ill. 536, 24 N. E. 571; Hanrahan v. P. 91 Ill. 147; Conn v. P. 116 Ill. 464, 6 N. E. 463; Donaway v. P. 110 Ill. 333; Perry v. P. 14 Ill. 496; P. v. Langton, 67 Cal. 427, 7 Pac. 843; 7 Am. Cr. R. 439; S. v. Milholland, 89 Iowa 5, 56 N. E. 403; Rosin v. U. S. 161 U. S. 29, 16 Sup. Ct. 43; S. v. Patterson, 116 Mo. 505, 22 S. W. 696; S. v. Barbee, 92 N. Car. 820, 6 Am. Cr. R. 180, 3 Greenleaf Ev. §§ 13, 14. See S. v. Sheppard, 49 W Va. 582, 39 S. E. 676, instructions held erroneous.

[2] Krehnavy v. S. 43 Neb. 337, 61 N. W. 628; P. v. Langton, 67 Cal. 427, 7 Pac. 843.

[3] Jackson v. P. 18 Ill. 270; P. v. Langton, 67 Cal. 427, 7 Pac. 843, 7 Am. Cr. R. 439; Krehnavy v. S. 43 Neb. 337, 61 N. W. 628; Achey v. S. 64 Ind. 59 (form); S. v. Wisdom, 84 Mo. 177. Contra: Black v. S. 18 Tex. App. 124; Rogers v. Com. 16 Ky. L. R. 199, 27 S. W. 813; P. v. Willett, 36 Hun (N. Y.), 500.

Also a charge which in substance states that if the jury believe beyond a reasonable doubt that the wrongful act had been intentionally committed, that is prima facie, but not conclusive proof, of criminal intent, is proper.[4] So it is proper to instruct that where an assault is made with a deadly weapon used in such manner as to be reasonably calculated to destroy life, the criminal intent may be inferred.[5]

An instruction that "if the instrument used be a deadly weapon, the use of it is conclusively presumed to be from a felonious and malicious intent, and the defendant must excuse the intent by proof or he will be held guilty," is inconsistent and contradictory.[6] A charge that if the jury believe from the evidence beyond a reasonable doubt that the defendant shot the deceased in a vital part and killed him, then, there being no evidence tending to disprove malicious intent, they should find that he intended to kill is proper.[7] But if the evidence fails to show any act or statement tending to support the inference of criminal intent then an instruction as to inferring such intent is improper and erroneous.[8]

§ 280. **On evidence disproving intent.**—Where there is any evidence tending to disprove malicious or criminal intent it is error to refuse to submit to the jury by proper instructions whether or not such intent existed, especially where a specific intent is an element of the crime charged.[9]

§ 281. **Drunkenness disproving intent.**—It is not improper to instruct on the law as to drunkenness where it appears from the evidence that the defendant was intoxicated at the time of the alleged criminal act.[10] At common law voluntary intoxication,

[4] U. S. v. Folson, 7 N. Mex. 532, 38 Pac. 70.

[5] Voght v. S. 145 Ind. 12, 43 N. E. 1049; Godwin v. S. 73 Miss. 873, 19 So. 712.

[6] Armstrong v. P. 38 Ill. 513; S. v. Painter, 67 Mo. 84 (meaningless and absurd).

[7] S. v. Silk, 145 Mo. 240, 44 S. W. 764. See S. v. Dolan, 17 Wash. 499, 50 Pac. 472· Dennis v. S. 118 Ala. 72, 23 So. 1002. Contra: Nilan v. P. 27 Colo. 206, 60 Pac. 485; Dorsey v. S. 110 Ga. 351, 35 S. E. 651.

[8] S. v. Kelly (Vt.), 51 Atl. 434.

[9] Smith v. S. 75 Miss. 542, 23 So. 260; Pena v. S. 38 Tex. Cr. App. 333, 42 S. W. 991; Darity v. S. 38 Tex. Cr. App. 546, 43 S. W. 982, (specific intent); Bailus v. S. 16 Ohio C. C. 227.

[10] Upchurch v. S. (Tex. Cr. App.), 39 S. W. 371. See Maynard v. S. (Tex. Cr. App.), 39 S. W. 667; P. v. Fish, 125 N. Y. 136, 26 N. E. 319.

as distinct from *mania a potu*, furnishes no excuse, justification or extenuation for a crime committed under its influence.[11] While drunkenness is no excuse for the commission of a criminal offense, yet where a specific intent is necessary to be proved before a conviction can be had, it is competent to show that the accused was at the time wholly incapable of forming such intent whether from intoxication or otherwise. In other words, it is a proper defense to show that the accused was intoxicated to such degree as rendered him incapable of entertaining the specific intent essential to the commission of the crime charged; and any instruction given to the jury which deprives the accused of that defense is therefore improper and erroneous.[12]

Thus, an instruction stating that drunkenness is no excuse for the commission of any crime or misdemeanor, unless such drunkenness was occasioned by fraud, contrivance or force of some other person for the purpose of causing the perpetration of an offense, and that where the act of the defendant would be criminal if committed when he was sober, the fact that he committed such act while intoxicated will constitute no defense, unless his intoxication was caused by some other person for the purpose above stated,—and this is the rule even where such intoxication is so extreme as to make the defendant unconscious of what he was doing, is erroneous.[13] And where there is evidence tending to support such defense the defendant, on making proper request, is entitled to have the jury instructed on intoxication.[14] On the trial of a case in which a specific intent is an essential element of the crime charged, it is error to refuse to charge the jury that if they entertain a reasonable doubt whether the defendant was sufficiently sober to form such intent,

[11] Underhill Cr. Ev. § 164, citing: 4 Blackstone Comm. 25, 26; 1 Hale, P. C. 32; Bacon's Maxims, Rule 5; Garner v. S. 28 Fla. 113, 153, 9 So. 835; Colee v. S. 75 Ind. 515; Hopt v. P. 104 U. S. 633; Godwin v. S. 96 Ind. 550; Wagner v. S. 116 Ind. 186, 18 N. E. 833; S. v. Murphy, 118 Mo. 7, 25 S. W. 95; P. v. Miller, 114 Cal. 10, 45 Pac. 986.

[12] Schwabacher v. P. 165 Ill. 619, 46 N. E. 809; Crosby v. P. 137 Ill. 340, 27 N. E. 49. See Reed v. Com. 98 Va. 817, 36 S. E. 399; Underhill Cr. Ev. § 166, citing: S. v. Zarn, 22 Ore. 591, 30 Pac. 317; Com. v. Hagenlock, 140 Mass. 125, 3 N. E. 36; Cline v. S. 43 Ohio St. 332, 1 N. E. 22; Aszman v. S. 123 Ind. 347, 24 N. E. 123; Chrisman v. S. 54 Ark. 288, 15 S. W. 889; Booher v. S. 156 Ind. 435, 60 N. E. 156.

[13] Schwabacher v. P. 165 Ill. 629, 46 N. E. 809. See McIntyre v. P. 38 Ill. 520.

[14] P. v. Hill, 123 Cal. 47, 55 Pac. 692; S. v. Pasnau, 118 Iowa, 501, 92 N. W. 682.

they could not find him guilty.[15] So the giving of an instruction that drunkenness is no excuse for the commission of a crime is improper where the drunkenness is shown in evidence, not as an excuse, but as the contributing cause of death by accident.[16]

§ 282. Malice and malice aforethought.—Malice, when an essential element of a case, is a fact to be determined by the jury from the evidence;[17] but the court in charging the jury may define the term.[18] The law implies malice from the unlawful killing with a deadly weapon and thus imposes upon the accused the burden of showing a want of malice;[19] and an instruction to the jury to that effect is proper.[20]

In a homicide case the mere fact that the accused may have killed another is not sufficient to warrant the giving of an instruction on a charge of murder.[21] It must appear that the killing was done with malice aforethought to constitute the crime.[22] Hence an instruction which undertakes to enumerate and submit to the jury for their determination what facts must be established to warrant a conviction of murder, but which omits the element of malice aforethought, is fatally defective.[23]

[15] Whitten v. S. 115 Ala. 72, 22 So. 483. See Booher v. S. 156 Ind. 435, 60 N. E. 156.

[16] S. v. Cross, 42 W. Va. 253, 24 S. E. 996. An instruction that "the jury must bear in mind that it is only the effect of intoxication, had upon the prisoner's mind in regard to his ability to design, deliberate and meditate upon and fully comprehend the act he did previous to its performance, which is material," has been held to be a proper statement of the law, Com. v. McGowen, 189 Pa. St. 641, 41 Atl. 365. See Com. v. Van Horn, 188 Pa. St. 143, 41 Atl. 469.

[17] Harpham v. Whitney, 77 Ill. 38; Frankfurter v. Bryan, 12 Ill. App. 549; Harrell v. S. 39 Tex. Cr. App. 204, 45 S. W. 581; Hidy v. Murray, 101 Iowa, 65, 69 N. W. 1138; Hirsch v. Feeney, 83 Ill. 548; Ritter v. Ewing, 174 Pa. St. 341, 34 Atl. 584; McClafferty v. Philp, 151 Pa. St. 86, 24 Atl. 1042; Ellis v. Simonds, 168 Mass. 316, 47 N. E. 116.

[18] Harrell v. S. 39 Tex. Cr. App. 204, 45 S. W. 581; S. v. Hunter, 118 Iowa, 686, 92 N. W. 872. See S. v. Dolan, 17 Wash. 499, 50 Pac. 472; S. v. Moody, 18 Wash. 165, 51 Pac. 356.

[19] Hughes Cr. Law, § 136, citing: Bankhead v. S. 124 Ala. 14, 26 So. 979; S. v. McDonnell, 32 Vt. 491; McQueen v. S. 103 Ala. 12, 15 So. 824; S. v. Decklotts, 19 Iowa, 447; Kent v. P. 8 Colo. 563, 9 Pac. 852; S. v. Earnest, 56 Kas. 31, 42 Pac. 359; Holderman v. Ter. (Ariz.), 60 Pac. 876.

[20] S. v. Zeibert, 40 Iowa, 173; Jenkins v. S. 82 Ala. 25, 2 So. 150.

[21] Hunter v. S. 74 Miss. 515, 21 So. 305.

[22] Tutt v. Com. 20 Ky. L. R. 492, 46 S. W. 675; S. v. Shafer (Mont.), 55 Pac. 526; Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61.

[23] Tutt. v. Com. Ky. L. R. 492, 46 S. W. 675; S. v. Schafer (Mont.), 55 Pac. 526; Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61; Coffey v. S. (Miss.), 24 So. 315; S. v. Smith, 102 Iowa, 656, 72 N. W. 279. See Leslie v. S. 42 Tex. Cr. App. 65, 57 S. W. 659.

An instruction, therefore, which submits that if the defendant "wilfully, feloniously and maliciously" killed the deceased he would be guilty of murder is erroneous in omitting the phrase "with malice aforethought."[24] Or an instruction that if the defendant "with a sedate and deliberate mind and formed design to kill, did unlawfully shoot and kill" the deceased, they should find him guilty of murder in the first degree, is erroneous in omitting the element of malice aforethought, although that element be clearly defined in another part of the charge.[25]

§ 283. **Instructions on inferring malice—Improper.**—A person may intentionally kill another and the act will be neither murder nor manslaughter. The intentional killing of an assailant in necessary self-defense is no crime whatever. An instruction, therefore, which states that if the defendant intended to kill the deceased the law will hold him responsible criminally, is erroneous.[26] So an instruction that "if one person attacks another without justifiable cause, and from the violence used death ensues, the question which arises is whether the killing be murder or manslaughter; that if the weapon used was a deadly weapon it is reasonable to infer that the person making the attack intended death and death was the consequence of his act, it is murder," for the same reason is fatally defective.[27] Where the court instructs that if the evidence shows that the health of the deceased was such that at the time he was struck by the defendant it was reasonably probable that death might ensue or that death might be hastened by the blow, then the defendant would be guilty, is erroneous, in that it fails to state that the act was unlawfully committed by the defendant.[28]

[24] Tutt v. Com. 20 Ky. L. R. 492, 46 S. W. 675; S. v. Schafer (Mont.), 55 Pac. 526.

[25] Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61. Contra: S. v. Hunt, 141 Mo. 626, 43 S. W. 389.

[26] P. v. Newcomer, 118 Cal. 263, 50 Pac. 405; Smith v. P. 142 Ill. 120, 31 N. E. 599.

[27] Smith v. P. 142 Ill. 123, 31 N. E. 599.

[28] Wooten v. S. 99 Tenn. 189, 41 S. W. 813.

CHAPTER XVII.

STATUTORY INSTRUCTIONS.

Sec.
284. Instructions in words of statute.
285. Instructions in words of statute—Improper, when.
286. Copying extracts from cases.

§ 284. Instructions in words of statute.—As a general rule the giving of instructions in the words of the statute is proper, although some of its terms, perhaps, ought to be explained;[1] or an instruction substantially in the language of the statute is not objectionable.[2] If any of the terms of a statute be ambiguous a party will not be heard to complain of the court stating the law to the jury in the language of the statute without explaining such terms, in the absence of a request for such explanation.[3]

Thus, under the statute of Florida, it is proper in charging the jury to give the definition of manslaughter and justifiable homicide in the exact words of the statute;[4] also of murder as defined by the statute of Mississippi.[5]

[1] Town of Fox v. Town of Kendall, 97 Ill. 80; Mt. Olive & S. Coal Co. v. Rademacher, 190 Ill. 543, 60 N. E. 888; P. v. Mills, 143 N. Y. 383, 38 N. E. 456; Rogers v. S. (Miss.), 21 So. 130; Dunn v. P. 109 Ill. 642.

[2] Petefish v. Becker, 176 Ill. 455, 52 N. E. 71; Neiders v. Bell, 174 Ill. 325, 51 N. E. 855, refusing instructions reciting statutory provisions, not error. Referring to a statute by name, as for instance, the "statute of frauds," in giving instructions without explaining its meaning is error; it is calculated to confuse and mislead the jury. Moshier v. Kitchell & Arnold, 87 Ill. 18, 22. Reference need not be made to the common law in charging the jury where offense is based upon a statute, Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

[3] Bailey v. Campbell, 2 Ill. (1 Scam.), 110.

[4] Driggers v. S. 38 Fla. 7, 20 So. 758.

[5] Rogers v. S. (Miss.), 21 So. 130.

The court is not required to give instructions defining words or phrases of the statute which are used in their ordinary sense and are easily understood. Thus, for instance, the words "serious bodily injury" used in defining an aggravated assault and battery, need not be defined in the instructions.[6] The giving of an instruction in the language of the statute containing provisions not relevant to the issues in the case is not error unless prejudicial to the rights of the party complaining.[7] Where the court has charged the jury in the language of the statute in one part of the charge which defines an offense, it is not error if some material word should be omitted in a subsequent part of the charge which refers to the same statute.[8]

§ 285. In words of statute—Improper, when.—But it is not always proper to give instructions in the language of the statute without qualification. In Illinois the giving of an instruction on the law of self-defense on homicide, in the words of the statute, is error.[9] The statute mentioned is as follows: "If a person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given."[10] The giving of an instruction in the language of this statute without qualification, limits the right of self-defense to actual danger, no matter how threatening may be the appearances, and deprives the defendant of

[6] De Los Santos v. S. (Tex. Cr. App.), 31 S. W. 395; Humphreys v. S. 34 Tex. Cr. App. 434, 30 S. W. 1066.

[7] P. v. Burns, 63 Cal. 614; S. v. Anderson, 10 Ore. 448; Needham v. P. 98 Ill. 275; P. v. Hughson, 154 N. Y. 153, 47 N. E. 1092. Contra: Whitcomb v. S. 30 Tex. App. 269, 17 S. W. 258. See Simons v. S. (Tex. Cr. App.), 34 S. W. 619. See "Definition of Offenses."

[8] Winkles v. S. 114 Ga. 449, 40 S. E. 259, intentionally omitted. Under the practice in some of the states the court in charging the jury may read the statutes defining the offense including the law as to the penalty, with which the defendant is charged. Com. v. Harris 168 Pa. St. 619, 32 Atl. 92; Miller v. Com. (Va.), 21 S. E. 499; P. v. Henderson, 28 Cal. 465; Simons v S. (Tex. Cr. App.), 34 S. W. 619; Ter. v. Mahaffey, 3 Mont. 116.

[9] Gainey v. P. 97 Ill. 277; McCoy v. P. 175 Ill. 230, 51 N. E. 777; Enright v. P. 155 Ill. 35, 39 N. E. 561; S. v. Laurie, 1 Mo. App. 371.

[10] Hurd's Ill. Stat. § 149, Chap. 38 Cr. Code.

the right to act in self-defense unless the killing was "absolutely necessary."[11]

§ 286. Copying extracts from cases.—In framing instructions it is not a wise practice to copy extracts or expressions from reported cases and formulate them into instructions. Such extracts may properly state the law applicable to the case from which they are copied, but not applicable to some other case of a different state of facts.[12] Such practice is held to be proper, however, if the instructions thus framed correctly state the law applicable to facts in issue.[13] So upon the same principle instructions may be framed by copying extracts from text-books (or read by the court according to the practice), providing such instructions properly state the law applicable to the facts of the case.[14] The court, however, is not bound to give such instructions, but may frame the charge in its own language.[15]

[11] Enright v. P. 155 Ill. 35, 39 N. E. 561; McCoy v. P. 175 Ill. 230, 51 N. E. 777; Gainey v. P. 97 Ill. 277. See Kinney v. P. 108 Ill. 524.

[12] Smoke &c. Co. v. Lyford 123 Ill. 300, 13 N. E. 844; Centralia & C. R. Co. v. Rixman, 121 Ill. 214, 12 N. E. 685. See Merrietta & C. R. Co. v. Picksley, 24 Ohio St. 668. See generally: Etchepare v. Aguirre, 91 Cal. 288, 27 Pac. 668; Laidlaw v. Sage, 80 Hun (N. Y.), 550; Freeman v. Weeks, 48 Mich. 255, 12 N. W. 215; Power v. Harlow, 57 Mich. 107, 23 N. W. 606.

[13] P. v. Minnaugh, 131 N. Y. 563, 29 N. E. 750; Estate of Spencer, 96 Cal. 448, 31 Pac. 453; Power v. Harlow, 57 Mich. 107, 23 N. W. 606; Kirby v. Wilson, 98 Ill. 240; Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. 338.

[14] P. v. Wayman, 128 N. Y. 585, 27 N. E. 1070; Bronnenburg v. Charman, 80 Ind. 475.

[15] P. v. Wayman, 128 N. Y. 585, 27 N. E. 1070; P. v. Niles, 44 Mich. 606, 7 N. W. 192.

CHAPTER XVIII.

ACCOMPLICE AS WITNESS.

Sec.
287. Accomplice defined.
288. Testimony of accomplice—How considered.
289. Testimony of accomplice—When corroboration is necessary.
290. Is witness an accomplice—Instructions.
291. Instructions assuming witness is an accomplice.
292. Duty to instruct on accomplices without request.
293. Principal and accessory—Instructions.

§ 287. **Accomplice defined.**—An accomplice is one who is in some way concerned in the commission of a crime, though not as principal; and this includes all persons who have been concerned in its commission, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact.[1] Another definition of an accomplice is one of many equally concerned in a felony, the term being generally applied to those who are admitted to give evidence against their fellow criminals for the furtherance of justice which might otherwise be excluded.[2]

§ 288. **Testimony of accomplice—How considered.**—In the absence of statutory provision, the jury may, if they see fit, convict on the uncorroborated testimony of accomplices alone, but such testimony should be acted upon with great care and caution; and it is the practice for the court to instruct the jury accordingly.[3] The refusal to direct the jury to weigh the testimony

[1] Cross v. P. 47 Ill. 58, 4 Blackstone Comm. 331; 1 Bouvier Law Dict. 46.

[2] Cross v. P. 47 Ill. 58.

[3] Hoyt v. P. 140 Ill. 596, 30 N. E. 315, 16 L. R. A. 239; S. v. Dana, 59 Vt. 614, 10 Atl. 727; S. v. Woolard, 111 Mo. 248, 20 S. W. 27. See

of accomplices with great care and caution may under some circumstances be prejudicial error.[4] Especially should the jury be directed to act upon such testimony with great caution where they are cautioned as to the testimony of the defendant.[5]

The court should instruct the jury to consider the inducements and influences for hope or promises under which an accomplice gives his testimony, as affecting his credibility as a witness, and a refusal to so instruct is error.[6] The giving of such cautionary instruction is not improper in not defining the phrase "with great caution."[7] An instruction that the jury should weight the testimony of an accomplice "with great caution," and that they may disregard it if they believe it to be untrue, is proper.[8] Also a charge that if the jury believe from the evidence that such witness has wilfully sworn falsely to any mate-

Tuberson v. S. 26 Fla. 472, 7 So. 858; P. v. Sternberg, 111 Cal. 11, 43 Pac. 201; Shiver v. S. 41 Fla. 631, 27 So. 36; S. v. Kennedy, 154 Mo. 268, 55 S. W. 293; Wisdom v. P. 11 Colo. 170, 17 Pac. 519; Allen v. S. 10 Ohio St. 288; Waters v. P. 172 Ill. 371, 50 N. E. 148; Underhill Cr. Ev. § 71. See also Cox v. Com. 125 Pa. St. 94 17 Atl. 227; Flanagin v. S. 25 Ark. 96; Com. v. Bosworth, 22 Pick. (Mass.), 398; S. v. Barber, 113 N. Car. 711, 18 S. E. 515; Ulmer v. S. 14 Ind. 52; S. v. Prudhomme, 25 La. Ann. 525; Rex v. Wilkes, 7 C. & P. 272; S. v. Hardin, 19 N. Car. 407; Collins v. P. 98 Ill. 589; S. v. Betsall, 11 W. Va. 704; Fitzcox v. S. 52 Miss. 923; Ingall v. S. 48 Wis. 647, 4 N. W. 785; U. S. v. Neverson, 1 Mackey (D. C.), 154.

[4] Hoyt v. P. 140 Ill. 596, 30 N. E. 315, 16 L. R. A. 239; P. v. Sternburg, 111 Cal. 11, 43 Pac. 201; S. v. Woolard, 111 Mo. 248, 20 S. W. 27. See also Cheatham v. S. 67 Miss. 335, 7 So. 204; S. v. Jones, 64 Mo. 391; S. v. Potter, 42 Vt. 495 (not error to refuse).

[5] S. v. Meyesenburg, 171 Mo. 1, 71 S. W. 239.

[6] Ter. v. Chavez, 8 N. Mex. 528, 45 Pac. 1107. Where on a plea of guilty to a charge of murder, the testimony of an accomplice is the only evidence as to the degree of the crime, the defendant is entitled to have the jury instructed on the testimony of an accomplice, Martin v. S. (Tex. Cr. App.), 38 S. W. 194.

[7] Home F. Ins. Co. v. Decker, 55 Neb. 346, 75 N. W. 841. An instruction on accomplices is sufficient if it refers to the testimony of an accomplice without adding "or accomplices," Yontz v. Com. 23 Ky. L. R. 1850, 66 S. W. 383.

[8] Wilson v. S. 71 Miss. 880, 16 So, 304; P. v. Sternberg, 111 Cal. 11, 43 Pac. 201; Brown v. S. 72 Miss. 990, 18 So. 431 (modified by adding: if the jury have a reasonable doubt of its truth); Wisdom v. P. 11 Colo. 170, 11 Pac. 519; S. v. Coates, 22 Wash. 601, 61 Pac. 726; P. v. Bonney, 98 Cal. 278, 33 Pac. 98; S. v. Kellerman, 14 Kas. 135; U. S. v. Sykes, 58 Fed. 1004; P. v. Costello, 1 Denio (N. Y.), 87; Arnold v. S. 5 Wyo. 439, 40 Pac. 967; S. v. Dana, 59 Vt. 614, 10 Atl. 727; Farrall v. Broadway, 95 N. Car. 551; S. v. Donnelly, 130 Mo. 642, 32 S. W. 1124; S. v. Dawson, 124 Mo. 418, 27 S. W. 1104.

rial matter they may disregard his entire testimony, is proper and its refusal is error.[9]

The court may, in its discretion, advise the jury that they ought not to convict on the uncorroborated testimony of an accomplice, but it is not bound to do so.[10] An instruction that it would not be safe to convict upon the testimony of an accomplice unless corroborated on some material point, and that such testimony should be carefully scrutinized, has been held to be improper.[11] Where the court charges that the accomplice has turned state's evidence to avoid the consequences of his part in the affair, and that the jury should take the circumstances into consideration in weighing his testimony, the refusal of an instruction that it is generally unsafe to convict on the testimony of an accomplice is not prejudicial error.[12]

§ 289. Testimony of accomplice—When corroboration is necessary.—Statutes exist in some of the states prohibiting a conviction on the uncorroborated testimony of accomplices, and the defendant, on making proper request, is entitled to instructions to that effect when warranted by the evidence; and it is error for the court to refuse.[13] And the nature and character of the corroborative testimony should be described or defined by proper instructions.[14] The defendant is entitled to have the jury instructed as to the meaning of corroborative evidence.[15] And the instruction must relate to the commission of the specific crime charged in the indictment and not to other offenses.[16] If there is evidence independent of the testimony of an accomplice tending to connect the accused with the commission of the crime charged,

[9] Owens v. S. 80 Miss. 499, 32 So. 152. It has been held improper to instruct that the testimony of the wife of an accomplice should be considered by the jury with caution, Crittenden v. S. 134 Ala. 145, 32 So. 273.

[10] Reg v. Farler, 8 C. & P. 106; Collins v. P. 98 Ill. 589; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560; S. v. Haney, 19 N. Car. 390; Black v. S. 59 Wis. 471, 18 N. W. 457; Allen v. S. 10 Ohio St. 288; S. v. Potter, 45 Vt. 495; Com. v. Holmes, 127 Mass. 424.

[11] Com. v. Clume, 162 Mass. 206, 38 N. E. 435.

[12] Com. v. Bishop, 165 Mass. 148, 42 N. E. 560, the accomplice was corroborated.

[13] Martin v. S. 36 Tex. Cr. 632, 36 S. W. 587, 38 S. W. 194; S. v. Reavis, 71 Mo. 419; Stewart v. S. 35 Tex. Cr. App. 174, 32 S. W. 766; S. v. Patterson, 52 Kas. 335, 34 Pac. 784; Bernhard v. S. 76 Ga. 613.

[14] Mitchell v. S. 38 Tex. Cr. App. 325, 42 S. W. 989; S. v. Pratt, 98 Mo. 482, 11 S. W. 977.

[15] P. v. Sternberg, 111 Cal. 11, 43 Pac. 201; Crawford v. S. (Tex. Cr. App.), 34 S. W. 927.

[16] P. v. Ward, 134 Cal. 301, 66 Pac. 372.

then an instruction directing the jury to acquit if they believe the witnesses were accomplices is properly refused.[17] And the court must determine, as a question of law, whether there is any evidence other than the testimony of accomplices tending to connect the defendant with the crime charged.[18]

Where a statute requires corroboration of an accomplice, such requirement should be substantially observed without the omission of any material thing mentioned in the statute. Thus, where a statute provides that such corroboration is not sufficient "if it merely shows the commission of the offense or the circumstances thereof," an instruction based on such statute which omits the element "or the circumstances thereof" is defective.[19] The refusal of an instruction as to the corroboration of an accomplice, although in the language of the statute, is not error where others in the charge in substance state that the testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the commission of the crime charged.[20]

One accomplice cannot corroborate another accomplice, and an instruction which in substance informs the jury, in so many words, is sufficient, though not stated in distinct terms.[21] A charge that one accomplice cannot corroborate another accomplice is properly refused in the absence of any evidence tending to show that the corroborating witness was an accomplice.[22]

§ 290. Is witness an accomplice—Instructions.—The evidence, of course, must show that the witness testifying was in fact an accomplice before the court is required to give instructions on the law relating to the testimony of accomplices;[23] and it must also appear that he in his testimony stated material facts

[17] Henry v. S. (Tex. Cr. App.), 43 S. W. 340.

[18] Kent v. S. 64 Ark. 247, 41 S. W. 849. The court should specifically instruct the jury that the corpus delicti of an offense can not be proved by the testimony of accomplice alone. Truelove v. S. (Tex. Cr. App.), 71 S. W. 601.

[19] S. v. Smith, 102 Iowa, 656, 72 N. W. 279; S. v. Jackson, 103 Iowa, 702, 73 N. W. 467. See S. v. Smith, 106 Iowa, 701, 77 N. W. 499 (holding instruction proper).

[20] Kent v. S. 64 Ark. 247, 41 S. W. 849; S. v. McDonald, 57 Kas. 537, 46 Pac. 966.

[21] Stevens v. S. (Tex. Cr. App.), 49 S. W. 105.

[22] Pace v. S. (Tex. Cr. App.), 31 S. W. 173.

[23] Robinson v. S. 35 Tex. Cr. App. 54, 43 S. W. 526; Brann v. S. (Tex. Cr. App.), 39 S. W. 940; Parr v. S. 36 Tex. Cr. App. 493, 38 S. W. 180; P. v. Chadwick, 7 Utah, 134, 25 Pac. 737. See Prendergast v. S. 41 Tex. Cr. App. 358, 57 S. W. 850; S. v. Burns (Nev.), 74 Pac. 984.

connecting or tending to connect the accused with the commission of the crime charged to entitle the defendant to such instructions.[24] If there is any evidence from which the jury might fairly infer that a witness was an accomplice, it is sufficient to warrant the giving of such instruction; and such inference may be drawn from the testimony of the witness himself.[25] And where it is suspected that a witness is or was an accomplice, the fact as to whether he was or was not may be submitted by instruction for the jury to determine, together with the effect of complicity on his testimony,[26] but it is error to submit the determination of the question to the jury without telling them what an accomplice is.[27] And in explaining the meaning of accomplice it is sufficient to give the statutory definition.[28] Mere suspicion, however, against a witness is not sufficient to warrant the conclusion that he was an accomplice; so an instruction stating that a witness is an accomplice is properly refused if there is no evidence to that effect.[29]

In a larceny case one who receives the stolen goods knowing the same to have been stolen is, on his becoming a witness for the prosecution, an accomplice, and the defendant is entitled to have the jury instructed on the law of accomplices.[30] Also on a charge of incest, where there is evidence tending to show that the woman consented to sexual intercourse with the defendant, the court should charge the jury that if they believe she was an accomplice they must find that she has been corroborated before they could convict the defendant.[31]

§ 291. Instructions assuming witness is an accomplice.—Where the evidence conclusively shows that a witness is an accomplice,

[24] Moseley v. S. 36 Tex. Cr. App. 578, 37 S. W. 736; Waggoner v. S. 35 Tex. Cr. App. 199, 32 S. W. 896 (accomplices refuse to testify).

[25] Arnold v. S. 5 Wyo. 439, 40 Pac. 967; Conde v. S. 33 Tex. Cr. App. 10, 24 S. W. 415.

[26] S. v. Haynes, 7 N. Dak. 352, 75 N. W. 267; Martin v. S. (Tex. Cr. App.), 43 S. W. 352; White v. S. 42 Tex. Cr. App. 567, 62 S. W. 575.

[27] Thomas v. S. (Tex. Cr. App.), 73 S. W. 1045; Carroll v. S. 45 Ark. 539; Suddeth v. S. 112 Ga. 407, 37 S. E. 747.

[28] Grinsinger v. S. (Tex. Cr. App.), 69 S. W. 583.

[29] S. v. Haynes, 7 N. Dak. 352, 75 N. W. 267; Smith v. S. 36 Tex. Cr. App. 442, 37 S. W. 743; Smith v. S. 10 Wyo. 157, 67 Pac. 977; O'Connor v. S. 28 Tex. App. 288, 13 S. W. 14.

[30] Kelly v. S. 34 Tex. Cr. App. 412, 31 S. W. 174.

[31] Stewart v. S. 35 Tex. Cr. App. 174, 32 S. W. 766; Coburn v. S. 36 Tex. Cr. App. 257, 36 S. W. 442.

the court may, as a matter of law, properly state the fact in charging the jury.[32] And where the evidence warrants the court in instructing that a witness is an accomplice, the giving of such instructions is not objectionable as assuming the defendant's guilt.[33] But to charge the jury that a witness is an accomplice according to his own testimony assumes that his testimony is true and is therefore erroneous.[34] An instruction which in substance states that if the jury believe the testimony of the accomplice has been corroborated they could convict the defendant is erroneous, in that it assumes the truth of the accomplice's testimony.[35] Also an instruction which assumes that a witness who is jointly indicted with the accused is an accomplice is erroneous.[36]

§ 292. Duty to instruct on accomplices without request.—In some of the states it is the duty of the court to give instructions on the law relating to the testimony of accomplices, whether requested to do so or not.[37] But the refusal of special requests cannot be urged as error where the court on its own motion fully instructs on the law relating to the testimony of accomplices.[38]

§ 293. Principal and accessory—Instructions.—If there is any evidence tending to connect the accused with others in the commission of an offense it is proper to instruct the jury on the law of principal and accessory.[39] Thus, on a trial for an assault with intent to kill where the evidence shows that two persons shot at the prosecuting witness at the same time, the court may charge the jury on the law of principal and accessory.[40] But unless there is evidence upon which to base the instruction it is error to give it.[41]

[32] Winfield v. S. (Tex. Cr. App.), 72 S. W. 182.

[33] Hatcher v. S. 43 Tex. Cr. App. 237, 65 S. W. 97; Torres v. S. (Tex. Cr. App.), 55 S. W. 828.

[34] Bell v. S. 39 Tex. Cr. App. 677, 47 S. W. 1010. See P. v. Reilly, 53 N. Y. S. 1005.

[35] Jones v. S. (Tex. Cr. App.), 72 S. W. 845.

[36] S. v. Spotted Hawk (Mont.), 33 Pac. 1026; Heivner v. P. (Colo.), 43 Pac. 1047.

[37] Williams v. S. 42 Tex. 392; Brace v. S. 43 Tex. Cr. App. 48, 62 S. W. 1067; Coburn v. S. 36 Tex. Cr. App. 257, 36 S. W. 442.

[38] Powell v. S. (Tex. Cr. App.), 44 S. W. 504.

[39] Houston v. S. (Tex. Cr. App.), 47 S. W. 468; Tidwell v. S. 40 Tex. Cr. App. 38, 48 S. W. 184. See Hankins v. S. 39 Tex. Cr. App. 261, 45 S. W. 807.

[40] Granger v. S. (Tex. Cr. App.), 31 S. W. 671.

[41] P. v. Smith, 105 Cal. 676, 39 Pac. 38.

The court is not required to instruct on the law of accessory after the fact in a homicide case where the evidence strongly tends to prove the defendant actually did the shooting, and there is no evidence tending to support the offense of accessory after the fact.[42] In defining accessory the instructions should follow the words of the statute, stating that an accessory is "one who advises *and* encourages, and not one who advises *or* encourages."[43] Where the evidence tending to connect the accused with the commission of an offense by conspiracy with others is circumstantial, he is entitled to have the jury instructed that he cannot be held responsible for what others may have done, unless he advised, aided or abetted in the commission of the offense.[44]

[42] McQuinn v. Com. 17 Ky. 500, 31 S. W. 872.

[43] S. v. Geddes, 22 Mont. 68, 55 Pac. 919.

[44] Howser v. S. (Ala.), 23 So. 681.

CHAPTER XIX.

ON REASONABLE DOUBT.

Sec.
294. Definition and elements.
295. Definition and elements—Illustrations.
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299. Doubt arises from whole evidence.
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§ 294. **Definition and elements.**—It is difficult to define what is a reasonable doubt, but all the authorities agree that such a doubt must be actual and substantial as contra-distinguished from a mere vague apprehension and must arise out of the evidence[1], or from a want of evidence.[2] The doubt must be supported by reason and not by mere conjecture and idle supposition irrespective of evidence.[3]

A reasonable doubt is not a mere whim, but is such a doubt as reasonable men may entertain after a careful and honest consideration of all the evidence in the case.[4] A reasonable doubt

[1] Hughes Cr. Law § 2488, citing: 3 Greenleaf Ev. (Redf. Ed.), § 29; Earll v. P. 73 Ill. 329; Carlton v. P. 150 Ill. 181, 192, 37 N. E. 244; Hopt v. Utah, 120 U. S. 430, 439, 7 Sup. Ct. 614; Underhill Cr. Ev. § 10.

[2] S. v. Blue, 136 Mo. 41, 37 S. W. 796; Brown v. S. 105 Ind. 390, 5 N. E. 900; Tomlinson v. S. (Tex. Cr. App.), 43 S. W. 332; Emery v. S. 101 Wis. 627, 78 N. W. 145; Wright v. S. 69 Ind. 165, 35 Am. R. 212; Densmore v. S. 67 Ind. 307. The omission of the words "want of evidence," in such an instruction, is not prejudicial error, however, where the evidence is exceedingly strong and overwhelming against the accused, Mathis v. S. 80 Miss. 491, 32 So. 6.

[3] P. v. Ross, 115 Cal. 233, 46 Pac. 1056; S. v. Patton, 66 Kas. 486, 71 Pac. 840; Carpenter v. S. 62 Ark. 286, 36 S. W. 900.

[4] P. v. Baker, 153 N. Y. 111, 47 N. E. 31. The rule of reasonable doubt has no application to the

is "that state of the case which, after considering and comparing all the evidence in the case, leaves the minds of the jury in that condition that they cannot say they feel an abiding conviction of the truth of the charge."[5] A reasonable doubt is also defined to be a doubt arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause.[6]

The giving of several instructions on reasonable doubt, defining that term in different forms, is not objectionable, although all the definitions or elements might be embodied in one instruction.[7] A charge defining a reasonable doubt to be "a doubt which a reasonable man of sound judgment, without bias, prejudice or interest, after calmly, consciously and deliberately weighing all the testimony, would entertain as to the guilt of the accused," cannot be complained of as error in the absence of a request for more adequate instructions on the subject.[8]

§ 295. Definition and elements—Illustrations.—An instruction which states that evidence is sufficient to remove a reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they

law of a case, but to the facts only, although the jury may be the judges of the law. Hence instructions in this respect are improper, S. v. Meyer, 58 Vt. 457, 3 Atl. 195; O'Neil v. S. 48 Ga. 66. The definition of reasonable doubt, according to the views of some courts, is of little or no practical benefit to the jury, S. v. Sauer, 38 Minn. 439, 38 N. W. 355; Hamilton v. P. 29 Mich. 195.

[5] Dunn v. P. 109 Ill. 645.

[6] Hughes Cr. Law, § 2488, citing: Dunn v. P. 109 Ill. 635; May v. P. 60 Ill. 119; Connaghan v. P. 88 Ill. 462; Little v. P. 157 Ill. 158, 42 N. E. 389; Com. v. Miller, 137 Pa. St. 77, 21 Atl. 138, 8 Am. Cr. R. 623. See P. v. Ah Sing, 51 Cal. 372, 2 Am. Cr. R. 482; P. v. Cneong Toon Ark, 61 Cal. 527. See also McArthur v. S. 60 Neb. 390, 83 N. W. 196; S. v. Cushanberry, 157 Mo. 168, 56 S. W. 737; S. v. Holloway, 150 Mo. 222, 56 S. W. 734; S. v. Baker, 136 Mo. 74, 37 S. W. 810; Frank v. S. 94 Wis. 211, 68 N. W. 657 (in their own important affairs); S. v. Case, 96 Iowa, 264, 65 N. W. 149; Allen v. S. 111 Ala. 80, 20 So. 490; S. v. Harris, 97 Iowa, 407, 66 N. W. 728; S. v. David, 131 Mo. 380, 33 S. W. 28; S. v. Gleim, 17 Mont. 17, 41 Pac. 998 ("highest concerns of his own interests"); Lawhead v. S. 46 Neb. 607, 65 N. W. 779 ("most important affairs or concerns of life"); S. v. Serenson, 7 S. Dak. 277, 64 N. W. 130; S. v. Crockett, 39 Ore. 76, 65 Pac. 447. See Emery v. S. 92 Wis. 146, 65 N. W. 848; S. v. Pierce, 65 Iowa, 89, 21 N. W. 195.

[7] Johnson v. P. 202 Ill. 53, 66 N. E. 877.

[8] S. v. Reed, 62 Me. 129; S. v. Smith, 65 Conn. 283, 31 Atl. 206; S. v. Johnson, 19 Wash. 410, 53 Pac. 667; P. v. Ahern, 93 Cal. 518, 29 Pac. 250; P. v. Waller, 70 Mich. 237, 38 N. W. 261.

would act upon the conviction without hesitation in their own most important affairs or in matters of highest importance to themselves where there is no compulsion to act at all, is proper.[9] Also an instruction which states that proof beyond a reasonable doubt means "such proof as satisfies the judgment and conscience of the jury as reasonable men applying their reason to the evidence before them that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible," is correct.[10]

A charge defining reasonable doubt to be "an actual, substantial doubt arising from the evidence or from a want of evidence in the case," is proper.[11] An instruction on reasonable doubt is not defective in failing to embody the phrase "to a moral certainty" in connection therewith.[12] Proof "beyond a reasonable doubt" and proof "to a moral certainty" are synonymous and equivalent.[13] Hence, an instruction stating that "a juror is understood to entertain a reasonable doubt when he has not an abiding conviction, to a moral certainty, that the person accused is guilty," properly states the law.[14]

A charge that a reasonable doubt is a doubt for which a reason may be given is erroneous.[15] Also an instruction charging that

[9] Garfield v. S. 74 Ind. 60; Reynolds v. S. 147 Ind. 3, 46 N. E. 31; Harris v. S. 155 Ind. 265, 58 N. E. 75; Jarrell v. S. 58 Ind. 293; Frank v. S. 94 Wis. 211, 68 N. W. 657; S. v. Kearley, 26 Kas. 77; Lawhead v. S. 46 Neb. 607, 65 N. W. 779; S. v. Gleim, 17 Mont. 17, 41 Pac. 998; S. v. Schoffer, 74 Iowa, 704, 39 N. W. 89; U. S. v. Jackson, 29 Fed. 503. Contra: Bray v. S. 41 Tex. 560; Jane v. Com. 2 Metc. (Ky.), 30; P. v. Brannon, 47 Cal. 96; P. v. Bemmerly, 87 Cal. 121, 25 Pac. 266. See also Com. v. Miller, 139 Pa. St. 77, 21 Atl. 138, 23 Am. St. 170; S. v. Settleworth, 18 Minn. 208.

[10] P. v. Ezzo, 104 Mich. 341, 62 N. W. 407.

[11] Ferguson v. S. 52 Neb. 432, 72 N. W. 590, 66 Am. St. 512; S. v. Duncan, 142 Mo. 456, 44 S. W. 263; Emery v. S. 101 Wis. 627, 78 N. W. 145; Powell v. S. 95 Ga. 502, 20 S. E. 483; P. v. Freidland, 37 N. Y. S. 974, 2 App. Div. 332 (absence of evidence); Earll v. P. 73 Ill. 329. See Tomlinson v. S. (Tex. Cr. App.), 43 S. W. 332.

[12] S. v. Van Tassel, 103 Iowa, 6, 72 N. W. 497.

[13] Carlton v. P. 150 Ill. 192, 37 N. E. 244; Com. v. Castley, 118 Mass. 1; Bailey v. S. 133 Ala. 155, 32 So. 57.

[14] S. v. Vansant, 80 Mo. 67; Sullivan v. S. 52 Ind. 309; McKleroy v. S. 77 Ala. 95; P. v. Phidillia, 42 Cal. 536; Carlton v. P. 150 Ill. 192, 37 N. E. 244; Dunn v. P. 109 Ill. 645 (to a reasonable and moral certainty); Com. v. Webster, 5 Cush. (Mass.). 320.

[15] Thompson v. S. 131 Ala. 18, 31 So. 725 (confusing); Jimmerson v. S. 133 Ala. 18, 32 So. 141; Cawley v. S. 133 Ala. 128, 32 So. 227; Morgan v. S. 48 Ohio St. 376, 27 N. E. 710; Avery v. S. 124 Ala. 20, 27 So. 505. Contra: Ellis v. S. 120 Ala. 333, 25 So. 1; Dennis v. S. 118 Ala. 72,

a reasonable doubt must be a very reasonable doubt is erroneous.[16] When the jury are satisfied "to a moral certainty and beyond a reasonable doubt," they are entirely satisfied, and an instruction which contains the proposition that the jury need not be "entirely satisfied" is erroneous.[17]

§ 296. Instructions on degree of proof.—To warrant a conviction the evidence must establish the guilt of the accused beyond a reasonable doubt and to a moral certainty; and the defendant on making proper request is entitled to have the term properly defined.[18] And all of the essential elements necessary to constitute the crime charged must be established to the same degree of certainty; and the court should so instruct the jury if requested.[19] But every incidental fact need not be established beyond a reasonable doubt. An instruction so requiring is too broad.[20]

The court in charging the jury on the law as to the meaning of reasonable doubt should not refuse the usual well known instruction defining the term, and substitute another instead, as, for instance, that such doubt must be based on common sense. To do so is error.[21] That the jury may conscientiously believe from the evidence that the defendant is guilty, does not meet the requirements of the law. "Conscientious belief" does not mean

23 So. 1002; P. v. Stubenvoll, 62 Mich. 329, 28 N. W. 883; Vann v. S. 83 Ga. 44, 9 S. E. 945; P. v. Guidici, 100 N. Y. 503, 3 N. E. 493.

[16] Nelson v. S. (N. J.), 35 Atl. 785.

[17] P. v. Kerrick, 52 Cal. 446; P. v. Phipps, 39 Cal. 326. Contra: S. v. Nelson, 11 Nev. 334.

[18] Rogers v. S. 117 Ala. 9, 22 So. 666; Walker v. S. 117 Ala. 42, 23 So. 149; Bones v. S. 117 Ala. 138, 23 So. 138; Godwin v. S. 73 Miss. 873, 19 So. 712. See also Webb v. S. 73 Miss. 456, 19 So. 238; Wacaser v. P. 134 Ill. 438, 25 N. E. 564, 23 Am. St. 683; Tensing v. S. (Tex. Cr. App.), 45 S. W. 572; Battle v. S. 103 Ga. 53, 29 S. E. 491; Ison v. Com. 23 Ky. L. R. 1805, 66 S. W. 184; Line v. S. 51 Ind. 172; Lovejoy v. S. 62 Ark. 478, 36 S. W. 575; Lensing v. S. (Tex. Cr. App.), 45 S. W. 572; Jones v. S. 107 Ala. 93, 18 So. 237, error to refuse instruction.

[19] S. v. Martin, 124 Mo. 514, 28 S. W. 12; Snyder v. S. 51 Ind. 111; S. v. Fannon, 158 Mo. 149, 59 S. W. 75; Crane v. S. 111 Ala. 45, 20 So. 590. Where the evidence clearly establishes guilt and is so convincing as not to suggest a doubt, error in refusing to instruct as to the law of reasonable doubt will be regarded as harmless, Sulter v. S. 76 Ga. 105; Van Brown v. S. 34 Tex. 186.

[20] S. v. Watkins, 106 La. 380, 31 So. 10; Wade v. S. 71 Ind. 541 (subsidiary matters, item by item, not to be established beyond reasonable doubt).

[21] P. v. Paulsill, 115 Cal. 6, 45 Pac. 734.

beyond a reasonable doubt,[22] nor does "full satisfaction of guilt" satisfy the law.[23] A charge that "if the facts and circumstances proved by a preponderance of the evidence are such as to satisfy the jury beyond a reasonable doubt," such evidence should have the same weight as direct evidence, is improper in not requiring that the facts themselves must be established beyond a reasonable doubt.[24]

§ 297. Instructions on probability, possibility.—A probability of the innocence of the accused is equivalent to reasonable doubt; hence, the refusal to charge the jury that "if there is a probability of the defendant's innocence he should be acquitted" is error.[25] The evidence is not required to exclude the possibility of innocence. Accordingly an instruction defining a reasonable doubt to be a serious, substantial and well founded doubt and not the mere possibility of a doubt, is proper.[26] And an instruction calling for proof strong enough to exclude the possibility of the innocence of the accused is, therefore, properly refused.[27]

[22] Orr v. S. (Miss.), 18 So. 118; Johnson v. S. (Miss.), 16 So. 494; Hemphill v. S. 71 Miss. 877, 16 So. 261; Brown v. S. 72 Miss. 95, 16 So. 202; Brown v. S. 72 Miss. 997, 17 So. 278.

[23] Williams v. S. 73 Miss. 820, 19 So. 826. See also Burton v. S. 107 Ala. 108, 18 So. 284; Rucker v. S. (Miss.), 18 So. 121; Compton v. S. 110 Ala. 24, 20 So. 119.

[24] Gill v. S. 59 Ark. 422, 27 S. W. 598. An instruction conveying the impression that the jury are authorized to convict of a misdemeanor on lighter evidence than is required to warrant a conviction of other offenses of a graver nature, is erroneous, P. v. Chartoff, 75 N. Y. S. 1088, 75 App. Div. 555.

[25] Whitaker v. S. 106 Ala. 30, 17 So. 456; Shaw v. S. 125 Ala. 80, 28 So. 390; Bones v. S. 117 Ala. 138, 23 So. 138; Croft v. S. 95 Ala. 3, 10 So. 517; Spraggins v. S. (Ala.), 35 So. 1002. Instructing the jury that even after the evidence has removed all probability of the defendant's innocence the law says the jury may entertain a reasonable doubt of his guilt and find him not guilty, is improper in that it is misleading. Bell v. S. 115 Ala. 25, 22 So. 526. See Pickens v. S. 115 Ala. 42, 22 So. 551; Adams v. S. 115 Ala. 90, 22 So. 612, 67 Am. St. 17.

[26] Earll v. P. 73 Ill. 329; Smith v. P. 74 Ill. 146; S. v. McCune, 16 Utah, 170, 51 Pac. 818; Little v. S. 89 Ala. 99, 8 So. 82; S. v. David, 131 Mo. 380, 33 S. W. 28; S. v. Dickey, 48 W. Va. 325, 37 S. E. 695; S. v. Cushenberry, 157 Mo. 168, 56 S. W. 737; McArthur v. S. 60 Neb. 390 ("fanciful suppositions"); S. v. Krug, 12 Wash. 288, 41 Pac. 126 ("imaginary"); Densmore v. S. 67 Ind. 306 (conjecture).

[27] Morris v. S. 124 Ala. 44, 27 So. 336; P. v. Smith, 105 Cal. 676, 39 Pac. 38; S. v. Garrison, 147 Mo. 548, 49 S. W. 508; Karr v. S. 106 Ala. 1, 17 So. 328; Le Cointe v. U. S. 7 App. Cas. (D. C.) 16; Powell v. S. 95 Ga. 502, 20 S. E. 483; S. v. Edie, 147 Mo. 535, 49 S. W. 563; P. v. Benham, 160 N. Y. 402, 55 N. E. 11 (absolute and positive proof); Emery v. S. 101 Wis. 627, 78 N. W. 145; S. v. Ostrander, 18 Iowa, 437. See also Bodine v. S. 129 Ala. 106,

But it is error to instruct that the rule requiring the guilt of the defendant to be established beyond a reasonable doubt, does not mean that it shall be "conclusively established."[28]

The law does not require proof of guilt to a mathematical certainty;[29] nor does it require proof to an absolute certainty.[30] A charge that absolute certainty is not required and it is rarely, if ever, possible in any case; but to justify a conviction, the evidence when taken as a whole and fairly considered must so satisfy your judgments and consciences as to exclude every other reasonable conclusion, has been held proper.[31] But in Alabama it has been held that an instruction charging that unless the evidence excludes to a moral certainty every reasonable hypothesis but that of the guilt of the accused, the jury must acquit, is erroneous as requiring too high a degree of proof.[32]

§ 298. Instruction on hunting up doubts.—The jury must confine themselves to the evidence before them; they cannot go

29 So. 926; Griffith v. S. 90 Ala. 583 ("clear and distinct proof"), 8 So. 812; Whatley v. S. 91 Ala. 108 (absolute belief), 9 So. 236; White v. S. 133 Ala. 122, 32 So. 139; P. v. Davis, 135 Cal. 162, 67 Pac. 59; Com. v. Devine, 18 Pa. Super. Ct. 431; S. v. Good, 132 Mo. 114, 33 S. W. 790; Abram v. S. 36 Tex. Cr. App. 44, 35 S. W. 389, instruction as to possibility of innocence held erroneous.

[28] P. v. Stephenson, 32 N. Y. S. 1112, 11 Misc. 141.

[29] Davis v. S. 114 Ga. 104, 39 S. E. 906; P. v. Hecker, 109 Cal. 451, 42 Pac. 307, "absolute moral certainty" not required; Jeffries v. S. 77 Miss. 757, 28 So. 948; Mose v. S. 36 Ala. 211 (circumstantial evidence).

[30] S. v. Marshall, 105 Iowa, 38, 74 N. W. 763. See Carleton v. S. 43 Neb. 373, 61 N. W. 699.

[31] S. v. Marshall, 105 Iowa, 38, 74 N. W. 763. See Carleton v. S. 43 Neb. 373, 61 N. W. 699.

[32] Barnes v. S. 111 Ala. 56, 20 So. 565; Gafford v. S. 122 Ala. 54, 25 So. 10. See Yarbrough v. S. 115 Ala. 92, 22 So. 534. See Dermis v. S. 118 Ala. 72, 23 So. 1002. It is improper to instruct that if the jury, after having heard all the evidence, feel a desire for more evidence showing the defendant's guilt, they have a reasonable doubt, Newell v. S. 115 Ala. 54, 22 So. 572.

Misleading: "The court instructs the jury that a reasonable doubt to warrant an acquital in a criminal case is not a mere possible doubt, but is such a doubt as, after mature comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge, or for which a reason can be given." This instruction was held bad because it is uncertain whether the last clause, "or for which a reason can be given," qualifies the word "doubt" or the word "conviction," thereby making the instruction misleading. S. v. Sheppard, 49 W. Va. 582, 39 S. E. 676. See Cleavenger v. S. (Tex. Cr. App.), 65 S. W. 89 (held bad also). See also Patzwald v. U. S. 7 Okla. 232, 54 Pac. 458; P. v. Swartz, 118 Mich. 292, 76 N. W. 491 (not misleading); Brown v. S. 128 Ala. 12, 29 So. 200 (misleading).

beyond the evidence to seek for or to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. An instruction so charging is proper.[33] Especially is such an instruction proper where the law as to the presumption of innocence has been fully and accurately stated in other instructions of the charge.[34]

§ 299. **Doubt arises from whole evidence.**—And a reasonable doubt which will authorize an acquittal is one as to the guilt of the accused on the whole of the evidence and not as to any particular fact.[35] Thus an instruction that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence and not as to any particular fact in the case" is proper.[36] Also an instruction "that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the state has proved each material fact charged and that the defendant is guilty," properly states the law.[37] It is, therefore, proper to refuse an instruction which directs the attention of the jury to some particular fact or facts in the case requiring proof of such facts beyond a reasonable doubt.[38]

[33] Miller v. P. 39 Ill. 457, 463; Voght v. S. 145 Ind. 12, 43 N. E. 1049; S. v. Elsham, 70 Iowa, 531, 31 N. W. 66.

[34] S. v. Nichols, 50 La. Ann. 699, 23 So. 980.

[35] Mullins v. P. 110 Ill. 47; Crews v. P. 120 Ill. 321, 11 N. E. 404; Williams v. P. 166 Ill. 136, 46 N. E. 749; Weaver v. P. 132 Ill. 536, 24 N. E. 571; Acker v. S. 52 N. J. L. 259; S. v. Stewart, 52 Iowa, 284; Nix v. S. 97 Ga. 211; Carr v. S. 84 Ga. 250; Barker v. S. 126 Ala. 69, 28 So. 685; McCullough v. S. 23 Tex. App. 626; Gordon v. S. 129 Ala. 113, 30 So. 30.

[36] Hughes Cr. Law § 3263, citing: Carlton v. P. 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; Mullins v. P. 110 Ill. 42; Davis v. P. 114 Ill. 86, 29 N. E. 192; Leigh v. P. 113 Ill. 372; Bressler v. P. 117 Ill. 422, 8 N. E. 62; Miller v. P. 39 Ill. 457; May v. P. 60 Ill. 119; Hoge v. P. 117 Ill. 35, 6 N. E. 796. Contra: S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 10 Am. Cr. R. 52.

[37] Bradshaw v. S. 17 Neb. 147, 22 N. W. 361, 5 Am. Cr. R. 499; Gott v. P. 187 Ill. 249, 58 N. E. 293; Allen v. S. 60 Ala. 19; Morgan v. S. 51 Neb. 672, 71 N. W. 788; Sumner v. S. 5 Blackf. (Ind.), 579, 36 Am. Dec. 561; S. v. Hayden, 45 Iowa, 11; Rudy v. Com. 128 Pa. St. 500, 18 Atl. 344.

[38] Ochs v. P. 124 Ill. 399, 429, 16 N. E. 662; Bressler v. P. 117 Ill. 439, 8 N. E. 62; Davis v. P. 114 Ill. 86, 98, 29 N. E. 192; Leigh v. P. 113 Ill. 379; Mullins v. P. 110 Ill.

So an instruction that a reasonable doubt need not arise from the whole evidence but may arise from a part of it, is properly refused. The reasonable doubt to justify an acquittal must arise, if at all, from the whole of the evidence taken together.[39] As previously stated, a reasonable doubt must arise out of the evidence or from a want of evidence. Hence an instruction stating that "if a reasonable doubt is raised by the ingenuity of counsel upon any hypothesis reasonably consistent with the evidence" the jury should acquit the defendant, is improper.[40] So a charge that the impeachment of one or more of the witnesses for the state might generate a reasonable doubt of the guilt of the defendant is improper.[41]

§ 300. Modification of instruction on reasonable doubt.—The modification of an instruction by changing the phrase "from all reasonable doubt" to "a reasonable doubt" is not error and affords no ground for complaint.[42] An instruction on reasonable doubt, requested in behalf of the defendant, which correctly states the law, may be modified without committing error, so as to present the theory of the prosecution on the same doctrine; as, for instance, after correctly stating the rule for the defendant it is proper to add: "But, on the other hand, if you are satisfied of the guilt of the accused to a reasonable and moral certainty, then it would be your duty to find him guilty."[43] So a charge that the law presumes that the defendant is innocent of the crime with which he is charged until he is proved guilty by competent evidence beyond a reasonable doubt; and if the evidence leaves in the minds of the jury any reasonable doubt of the defendant's guilt the law makes it the duty of the jury to acquit him, is properly modified by striking out the phrase "beyond a reasonable doubt."[44]

42; Mann v. S. 134 Ala. 1, 32 So. 704; Winter v. S. 133 Ala. 176, 32 So. 125; Liner v. S. 124 Ala. 1, 27 So. 438; Barker v. S. 126 Ala. 69, 28 So. 685; S. v. Dunn, 18 Mo. 419. Contra: Com. v. Leonard, 40 Mass. 473.

[39] Bryant v. S. 34 Fla. 291, 16 So. 177; S. v. Myers, 12 Wash. 77, 40 Pac. 626.

[40] P. v. Wells, 112 Mich. 648, 71 N. W. 176; P. v. Ammerman, 118 Cal. 23, 50 Pac. 15; United States v. Harper, 33 Fed. 471; Horton v. Com. 99 Va. 848, 38 S. E. 184. See P. v. Kaiser, 119 Cal. 456, 51 Pac. 702; Walker v. S. (Ala.), 35 So. 1011.

[41] Crawford v. S. 112 Ala. 1, 21 So. 214; Cobb v. S. 115, Ala. 18, 22 So. 506.

[42] P. v. Burns, 121 Cal. 529, 53 Pac. 1096.

[43] Bone v. S. 102 Ga. 387, 30 S. E. 845; McIntosh v. S. 151 Ind. 251, 51 N. E. 354.

[44] Schintz v. P. 178 Ill. 320, 52 N. E. 903.

§ 301. Instruction as to each juror.—Each juror must be satisfied beyond a reasonable doubt that the defendant is guilty as charged, before he can, under his oath, consent to a verdict of conviction. So an instruction that if any one of the jurors, after having duly considered all the evidence, and after having consulted with his fellow-jurymen, entertains such reasonable doubt, the jury cannot, in such case, find the defendant guilty, is correct in point of law.[45] Also a charge that "if after consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of guilty, nor to be influenced in so voting for the single reason that a majority of the jury should be in favor of a verdict of guilty," has been approved.[46]

A charge that "if any one of the jurors has a reasonable doubt of the guilt of the defendant, they are not, for that reason, required to acquit," is not improper, for the reason that a lack of unanimity does not necessarily require an acquittal. A mistrial may be proper.[47] But a charge that "if there be one juryman who believes the state has not proved the defendant guilty beyond a reasonable doubt and to a moral certainty, then such juryman should not consent to a verdict" has been held bad, in that it is calculated to impress the mind of a juror with the idea that his verdict must be reached and adhered to without the aid of that consideration and deliberation with his fellow-jurors which the law requires.[48] Also an instruction that if any juror is not

[45] Meehan v. S. (Wis.), 97 N. W. 174; Castle v. S. 75 Ind. 146; Stitz v. S. 104 Ind. 359; S. v. Ryno (Kas.), 74 Pac. 1111; Parker v. S. 136 Ind. 284, 35 N. E. 1105; Shenkenberger v. S. 154 Ind. 643, 57 N. E. 519; Fassinon v. S. 89 Ind. 235; Fletcher v. S. 132 Ala. 10, 31 So. 561; S. v. Howell, 26 Mont. 3, 66 Pac. 293; Grimes v. S. 105 Ala. 86, 17 So. 184; S. v. Rodgers, 56 Kas. 362, 43 Pac. 256. See Little v. S. 157 Ill. 157, 42 N. E. 389. Contra: Hodge v. Ter. (Okla.), 69 Pac. 1080; S. v. Garth, 164 Mo. 553, 65 S. W. 275; S. v. Young, 105 Mo. 640, 16 S. W. 408; Fogarty v. S. 80 Ga. 450, 5 S. E. 782; Baldwin v. S. (Fla.), 35 So. 221; Davis v. S. 63 Ohio St. 173, 57 N. E. 1099; Cook v. S. (Fla.), 35 So. 669.

[46] P. v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. 50.

[47] Neville v. S. 133 Ala. 29, 32 So. 596; Andrews v. S. 134 Ala. 47, 32 So. 665. See S. v. Rorbacher, 19 Iowa, 155.

[48] Cunningham v. S. 117 Ala. 59, 23 So. 693; Goldsmith v. S. 105 Ala. 8, 16 So. 933; Pickens v. S. 115 Ala. 42, 22 So. 551; P. v. Rodley, 131 Cal. 240, 63 Pac. 251; S. v. Rathbun, 74 Conn. 524, 51 Atl. 540; Davis v. S. 63 Ohio St. 173 (held misleading). See, also, S. v. Robinson, 12 Wash. 491, 41 Pac. 884.

satisfied beyond a reasonable doubt of the guilt of the defendant, his duty requires that he should refuse to agree to a verdict of guilty, that a juror is not expected to surrender his individual judgment in order to reach an agreement, has been held improper as being an invitation to the jury to disagree.[49]

§ 302. Instruction that jurors "believe as men."—In charging the jury on the subject of reasonable doubt it is not improper to state that "a juror is not at liberty to disbelieve as a juror what he believes as a man;"[50] or to instruct that their oaths impose upon them no obligation to doubt where no doubt would have existed if no oath had been administered, is not objectionable.[51] Also an instruction, "you should be convinced as jurors where you would be convinced as citizens, and you should doubt as jurors only where you would doubt as men" from the evidence, is proper.[52]

[49] S. v. Rue, 72 Minn. 296, 75 N. W. 235; P. v. Hill, 116 Cal. 562, 48 Pac. 711; Little v. P. 157 Ill. 153, 42 N. E. 389; S. v. Taylor, 134 Mo. 109, 35 S. W. 92; S. v. Fry, 67 Iowa, 475, 25 N. W. 738.

[50] P. v. Worden, 113 Cal. 569, 45 Pac. 844; Leisenberg v. S. 60 Neb. 628, 84 N. W. 6; Bartley v. S. 53 Neb. 310, 73 N. W. 744. See S. v. Elsham, 70 Iowa, 531, 31 N. W. 66. Contra: P. v. Johnson, 140 N. Y. 350, 35 N. E. 604; Cross v. S. 132 Ind. 65, 31 N. E. 473; Lawhead v. S. 46 Neb. 607, 65 N. W. 779; P. v. Wayman, 128 N. Y. 587, 27 N. E. 1070; S. v. Pierce, 65 Iowa, 85, 21 N. W. 195; Fanton v. S. 50 Neb. 351, 69 N. W. 953; S. v. Bridges, 29 Kas. 138; Adams v. S. 135 Ind. 571, 34 N. E. 956.

[51] Barney v. S. 49 Neb. 515, 68 N. W. 636; Fanton v. S. 50 Neb. 351, 69 N. W. 953, 36 L. R. A. 158; Bartley v. S. 53 Neb. 310, 73 N. W. 744.

[52] McMeen v. Com. 114 Pa. St. 300, 9 Atl. 878.

CHAPTER XX.

ON CIRCUMSTANTIAL EVIDENCE.

Sec.
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§ 303. **When evidence is circumstantial.**—"Circumstantial evidence is legal and competent evidence in criminal cases; and if it is of such character as to exclude every reasonable hypothesis other than that of the guilt of the defendant, it is sufficient to authorize a conviction." In other words, circumstantial evidence alone is sufficient to authorize a conviction when it convinces the jury of the guilt of the accused beyond a reasonable doubt.[1] And in charging the jury the court may properly cau-

[1] Cunningham v. S. 56 Neb. 691, 77 N. W. 60; Hughes Cr. Law, § 3204, citing, Carlton v. P. 150 Ill. 187, 37 N. E. 244, 41 Am. St. 346; P. v. Daniels (Cal.) 34 Pac. 233; S. v. Avery, 113 Mo. 475, 21 S. W. 193; S. v. Slingerland, 19 Neb. 141, 7 Pac. 280; S. v. Hunter, 50 Kas. 302, 32 Pac. 37; S. v. Elsham, 7 Iowa, 531, 31 N. W. 66. Facts may be proved in civil as well as criminal cases by circumstantial evidence, Jones v. Hess (Tex. Cr. App.), 48 S. W. 46.

tion them that it is wrong to have a prejudice against convicting on circumstantial evidence.[2]

Where the evidence against the accused is entirely circumstantial, the court should, when properly requested, charge the jury on the law of circumstantial evidence, and a refusal to do so is usually reversible error.[3] The fact, however, that the court did not fully and sufficiently instruct on the law of circumstantial evidence affords no ground to complain of error in the absence of a request for a more specific charge.[4] But according to the practice in some jurisdictions it is the duty of the court to instruct on the law of circumstantial evidence whether requested to do so or not.[5]

§ 304. When evidence is direct and circumstantial.—But if the evidence is both direct and circumstantial a party cannot insist on having the jury charged on the law of circumstantial evidence. The rule governs only where a conviction depends entirely upon such evidence.[6] It is not improper, however, to instruct on

[2] S. v. Aughtry, 49 S. Car. 285, 26 S. E. 619.

[3] Hank v. S. (Tex. Cr. App.), 56 S. W. 922; Davis v. S. (Tex. Cr. App.), 54 S. W. 583; Arismendis v. S. 41 Tex. Cr. App. 374, 54 S. W. 599; Rountree v. S. (Tex. Cr. App.), 58 S. W. 106; Jones v. S. 105 Ga. 649, 31 S. E. 574; Ter. v. Lermo, 8 N. Mex. 566, 46 Pac. 10; Lopez v. S. 37 Tex. Cr. App. 649, 40 S. W. 972; Polanka v. S. 33 Tex. Cr. App. 634, 28 S. W. 541; Adams v. S. 34 Tex. Cr. App. 470, 31 S. W. 372; Leftwich v. S. 34 Tex. Cr. App. 489, 31 S. W. 385 (facts stated). Contra: Richards v. S. (Ga.), 27 S. E. 726. See Crews v. S. 34 Tex. Cr. App. 533, 31 S. W. 373; S. v. Austin, 129 N. Car. 534, 40 S. E. 4; Beason v. S. 43 Tex. Cr. App. 442, 67 S. W. 96; Hart v. S. (Ga.), 23 S. E. 831; Green v. S. (Tex. Cr. App.), 34 S. W. 283; Childers v. S. 37 Tex. Cr. App. 392, 35 S. W. 654 (owner of property involved circumstantial); Ter. v. Lermo, 8 N. Mex. 566, 46 Pac. 16; P. v. Scott, 10 Utah, 217, 37 Pac. 335; S. v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; Boyd v. S. 24 Tex. App. 570; U. S. Express Co. v. Jenkins, 64 Wis. 542, 25 N. W. 549; S. v. Donnelly, 130 Mo. 642, 32 S. W. 1124.

[4] Barnett v. Farmers' M. F. Ins. Co. 115 Mich. 247, 73 N. W. 372; Ponder v. S. 115 Ga. 831, 42 S. E. 224.

[5] Jones v. S. 105 Ga. 649, 31 S. E. 574. See, also, P. v. Scott, 10 Utah, 217, 37 Pac. 335; S. v. Donnelly, 130 Mo. 642, 32 S. W. 1124; Martin v. S. 32 Tex. Cr. App. 441, 24 S. W. 512; Childers v. S. 37 Tex. Cr. App. 35 S. W. 654.

[6] Grover v. S. (Tex. Cr. App.), 46 S. W. 824; Williams v. S. (Tex. Cr. App.), 45 S. W. 494; Taylor v. S. (Tex. Cr. App.), 42 S. W. 285; Houston v. S. (Tex. Cr. App.), 47 S. W. 468; Rios v. S. 39 Tex. Cr. App. 675, 47 S. W. 987; Colter v. S. 37 Tex. Cr. App. 284, 39 S. W. 576; Rodgers v. S. 36 Tex. Cr. App. 563, 38 S. W. 184; Moore v. S. 97 Ga. 759, 25 S. E. 362; Upchurch v. S. (Tex. Cr. App.), 39 S. W. 371; Evans v. S. (Tex. Cr. App.), 31 S. W. 648; Carmarillo v. S. (Tex. Cr. App.), 68 S. W. 795; Roberts v. Port Blakely Mill Co. 30 Wash. 25, 70 Pac. 111; S. v. Donnelly, 130 Mo. 642, 32 S.

circumstantial evidence where the evidence is largely circumstantial; but the court is not bound to do so.[7] So where the whole of the evidence is given by eye witnesses to the transaction in question an instruction as to the weight of circumstantial evidence is improper.[8] And if the evidence is composed of both direct and circumstantial the refusal to charge the jury that the burden is on the prosecution to establish beyond a reasonable doubt the existence of each link in the chain of circumstances is not ground for error.[9] So if there is any direct evidence fairly tending to connect the defendant with the commission of the crime charged he is not entitled to have the jury instructed on the law of circumstantial evidence.[10]

The failure of the court to charge on circumstantial evidence where there is positive evidence of the commission of the offense charged, though given by an accomplice only, is not error.[11] Also, if the accused admits that he committed the crime charged, the law of circumstantial evidence need not be given to the jury.[12] And if the defendant confesses his guilt as charged, he cannot insist upon instructions on circumstantial evidence, where the corpus delicti is clearly established by other competent

W. 1124; Granado v. S. 37 Tex. Cr. App. 426, 35 S. W. 1069; P. v. Lem Deo, 132 Cal. 199, 64 Pac. 265; Rains v. S. 88 Ala. 91, 70 So. 315.

[7] Rountree v. S. (Tex. Cr. App.), 58 S. W. 106.

[8] Welch v. S. 124 Ala. 41, 27 So. 307; Red v. S. (Tex. Cr. App.), 53 S. W. 618; Wolf v. S. (Tex. Cr. App.), 53 S. W. 108; Leftwick v. S. (Tex. Cr. App.), 55 S. W. 571; P. v. Burns, 121 Cal. 529, 53 Pac. 1096; Campbell v. S. 35 Tex. Cr. App. 160, 38 S. W. 171; Purvis v. S. 71 Miss. 706, 14 So. 268; Thompson v. S. 33 Tex. Cr. App. 217, 26 S. W. 198; Vaughan v. S. 37 Ark. 1; S. v. Fairlamb, 121 Mo. 137, 25 S. W. 895; Moore v. S. 97 Ga. 759, 25 S. E. 362; Purvis v. S. 71 Miss. 706, 14 So. 268; Granado v. S. 37 Tex. Cr. App. 426, 35 S. W. 1069; Gann v. S. (Tex. Cr. App.), 59 S. W. 896; Evans v. S. (Tex. Cr. App.), 31 S. W. 648, that the eye witness is the prosecuting witness is sufficient to take the case out of the rule.

[9] S. v. Calder, 23 Mont. 504, 59 Pac. 903; Nite v. S. 41 Tex. Cr. App. 340, 54 S. W. 763; Hodge v. Ter. (Okla.), 69 Pac. 1077.

[10] Alexander v. S. 40 Tex. Cr. App. 395, 49 S. W. 229; Givens v. S. 34 Tex. Cr. App. 563, 34 S. W. 626.

[11] Wampler v. S. 28 Tex. App. 352; Rios v. S. (Tex. Cr. App.), 48 S. W. 505: Vaughan v. S. 57 Ark. 1, 20 S. W. 588; Kidwell v. S. 35 Tex. Cr. App. 264, 33 S. W. 342; S. v. Donnelly, 130 Mo. 642, 32 S. W. 1124; Thompson v. S. 33 Tex. Cr. App. 217, 26 S. W. 198.

[12] Franks v. S. (Tex. Cr. App.), 45 S. W. 1013; Jackson v. S. (Tex. Cr. App.), 62 S. W. 914; Paul v. S. (Tex. Cr. App.), 45 S. W. 725; Smith v. S. 24 Tex. Cr. App. 265, 30 S. W. 236; S. v. Robinson, 117 Mo. 649, 23 S. W. 1066; Albritton v. S. (Tex. Cr. App.), 26 S. W. 398; White v. S. 32 Tex. Cr. App. 625, 25 S. W. 784; Perry v. S. 110 Ga. 234, 36 S. E. 781; Langdon v. P. 133 Ill. 408, 24 N. E. 874.

evidence.[13] So, also, where the only issue or defense is insanity on which the evidence is direct, the court may properly refuse to instruct on circumstantial evidence.[14] And in a larceny case if the taking of the property be admitted, but claimed to have been lawfully taken, it is not error to refuse to charge on circumstantial evidence even for the purpose of proving criminal intent.[15] But where only possession of stolen property is relied on to connect the accused with the commission of the offense charged, the court cannot properly refuse to instruct on circumstantial evidence.[16]

§ 305. Instructing on comparative weight improper.—Where an instruction contains any comment as to the comparative weight of direct and circumstantial evidence, or upon the reliability of the one kind as compared with the other, it is improper as a comment on the weight of the evidence and may be refused. Thus a charge stating that "the law makes no distinction between circumstantial and positive evidence" is improper in the absence of a qualification as to the care to be used in considering circumstantial evidence.[17] Or to charge that circumstantial evidence is often more reliable than direct testimony of eye witnesses, and a verdict of guilty in such cases may rest on a surer basis than when rendered upon the testimony of eye witnesses whose memory must be relied upon and whose passions or prejudices may have influenced them, is error.[18] So, also, to charge the jury that "circumstantial evidence is just as good and convincing and just as reliable as direct and positive evidence when properly

[13] Dennis v. S. 118 Ala. 72, 23 So. 1002; Carmona v. S. (Tex. Cr. App.), 65 S. W. 928; Hannigan v. S. 131 Ala. 29, 31 So. 89; S. v. Armstrong, 167 Mo. 257, 66 S. W. 961; Roberts v. S. (Tex. Cr. App.), 70 S. W. 423; S. v. Gartrell, 171 Mo. 489, 71 S. W. 1045; Wampler v. S. 28 Tex. Cr. App. 352 (direct proof by accomplice); Green v. S. 97 Ala. 59, 12 So. 416, 15 So. 242.

[14] S. v. Soper, 148 Mo. 217, 49 S. W. 1007.

[15] Houston v. S. (Tex. Cr. App.), 47 S. W. 468; Gann v. S. (Tex. Cr. App.), 59 S. W. 896 (ownership the only question contested).

[16] Wallace v. S. (Tex. Cr. App.), 66 S. W. 1102; Poston v. S. (Tex. Cr. App.), 35 S. W. 656; Stewart v. S. (Tex. Cr. App.), 77 S. W. 791.

[17] Burt v. S. 72 Miss. 408, 16 So. 342, 48 Am. St. 563, note; S. v. Dotson, 26 Mont. 205, 67 Pac. 938. A charge that all the evidence relied upon to connect the defendant with the commission of the crime charged is circumstantial, has been held to be improper as a comment upon the evidence, S. v. Aughtry, 49 S. Car. 285, 26 S. E. 619.

[18] S. v. Musgrave, 43 W. Va. 676, 28 S. E. 813; P. v. O'Brien, 130 Cal. 1, 62 Pac. 297. See Gibson v. S. 76 Miss. 136, 23 So. 582.

linked together" is improper, in that it invades the province of the jury.[19] The court may, however, properly state to the jury that the evidence before them consists of both direct and circumstantial;[20] and it is proper to explain the difference between them.[21] The difference between the two kinds may be shown by defining each in charging the jury.[22] And if the court errs in charging as to the distinction between the two kinds of evidence, the error will be rendered harmless where the court correctly instructs on the legal definition of both classes of evidence.[23]

§ 306. **Instructions improper—Illustrations.**—According to the principle stated in the preceding section, it is proper to refuse an instruction that "the strength of circumstantial evidence must be equal to the strength of the testimony of one credible eyewitness"—where the case is one depending upon circumstantial evidence alone.[24] Or to charge that "before the jury can convict the defendant they must be as well satisfied from the combination of circumstances that the defendant did the killing as though an eyewitness had testified before them that the defendant did the killing", is improper.[25] Or a charge that the "humane provision of the law" is that circumstantial evidence, to justify a conviction, must exclude to a moral certainty every reasonable hypothesis but that of the guilt of the accused, is properly refused.[26]

§ 307. **Instructions not improper—Illustrations.**—But a charge that there is no practical difference between direct and circumstantial evidence, that the sole question is whether the jury are satisfied from the evidence, of the defendant's guilt, beyond

[19] Hudson v. Best, 104 Ga. 131, 30 S. E. 688; Armstrong v. Penn, 105 Ga. 229, 31 S. E. 158. See Gantling v. S. 40 Fla. 237, 23 So. 857; Horton v. S. (Tex. Cr. App.), 19 S. W. 899.

[20] Davis v. S. 51 Neb. 301, 70 N. W. 984.

[21] Joiner v. S. 105 Ga. 646, 31 S. E. 556.

[22] Robinson v. S. 114 Ga. 56, 39 S. E. 862.

[23] Roberts v. S. 83 Ga. 369, 9 S. E. 675.

[24] S. v. Carson, 115 N. Car. 743, 20 So. 384; Buchman v. S. 109 Ala. 7, 19 So. 410; P. v. Daniels (Cal.), 34 Pac. 233; Thornton v. S. 113 Ala. 43, 21 So. 356; Banks v. S. 72 Ala. 522; S. v. Slingerland, 19 Nev. 135, 7 Pac. 280. See Brown v. S. 23 Tex. 195. See, also, S. v. Norwood, 74 N. Car. 248; Mickle v. S. 27 Ala. 20; Rea v. S. 8 Lea (Tenn.), 363; Jane v. Com. 2 Metc. (Ky.), 30; Cicely v. S. 13 S. & M. (Miss.), 202.

[25] Banks v. S. 72 Ala. 522.

[26] Dennis v. S. 112 Ala. 64, 20 So. 925; Crawford v. S. 112 Ala. 1, 21 So. 214.

a reasonable doubt, has been sustained as a proper instruction.[27] Or that "there is nothing in the nature of circumstantial evidence that renders is less reliable than other classes of evidence" is not improper.[28]

A charge that "circumstantial evidence, if complete, may be as conclusive or convincing as direct or positive evidence of eyewitnesses. When it is strong and satisfactory, the jury should consider it fairly, neither enlarging nor belittling its force," is not so far erroneous as to warrant a reversal of a judgment.[29] Nor is it prejudicial error in charging the jury, to tell them that those who declare it to be cruel or criminal to convict on circumstantial evidence are knaves or fools.[30] And it has been held not improper to charge that in order to convict, "the circumstantial evidence should be such as to produce nearly the same degree of certainty as that which arises from direct testimony, and to exclude a rational probability of innocence."[31] Also a charge that if circumstantial evidence is of such a character as to exclude every reasonable hypothesis other than that of the guilt of the defendant, it is entitled to the same weight as direct evidence, is not improper.[32]

§ 308. Drawing inferences—Instructions.—It is for the jury to determine from the entire evidence what inference may be drawn, if any, from a state of facts and circumstances without being instructed as to what weight they are to attach to any portion of the evidence. When the court says that a certain inference may be drawn from certain facts, if proved, a jury would understand the instruction as meaning that it is their duty to draw such inference; at least it would indicate that the court thought it proper that the inference should be drawn.[33] Facts may be inferred by the jury from circumstances

[27] S. v. Rome, 64 Conn. 329, 30 Atl. 57.

[28] P. v. Uquidas, 96 Cal. 239, 31 Pac. 52.

[29] Union C. Life Ins. Co. v. Skipper, 115 Fed. 69, 75; Smith v. S. 61 Neb. 296, 85 N. W. 49.

[30] Hickory v. United States, 151 U. S. 303, 14 Sup. Ct. 334.

[31] P. v. Cronin, 34 Cal. 191. See, also, P. v. Stewart, 75 Mich. 21, 42 N. W. 662; Brookin v. S. 26 Tex. App. 121, 9 S. W. 735. Contra: S. v. Dotson, 26 Mont. 305, 67 Pac. 938.

[32] Reynolds v. S. 147 Ind. 3, 46 N. E. 31; Gill v. S. 59 Ark. 422, 27 S. W. 598; Longley v. Com. 99 Va. 807, 37 S. E. 337; Davis v. S. 51 Neb. 301, 70 N. W. 984; Smith v. S. 35 Tex. Cr. App. 618, 34 S. W. 960; P. v. Neufeld, 165 N. Y. 43, 58 N. E. 786.

[33] Hackelrath v. Stookey, 63 Ill.

proved.[34] But the court has nothing to do with the facts, and cannot instruct the jury as to what inferences may or may not be drawn from the proof of other facts.[35] But a charge telling the jury that it is for them to say whether or not they will draw a certain inference, if it should seem proper for them to do so, is not error.[36]

§ 309. Instructing to convict on proof of certain facts—Effect. The court cannot, as a matter of law, direct the jury to convict the accused if they believe beyond a reasonable doubt that the facts and circumstances pointing toward his guilt are true. The jury may believe that such facts have been conclusively established as required, yet they may not regard the facts and circumstances so proved sufficient to satisfy their judgment and conscience of the defendant's guilt. The facts and circumstances might be true, but not sufficient to warrant a conviction.[37] Hence an instruction which directs the jury to convict the accused, if they believe the facts and circumstances beyond a reasonable doubt pointing toward his guilt, is erroneous;[38] such an instruction is an invasion of the province of the jury.[39]

Also a charge directing the jury to convict the defendant if the facts and circumstances in evidence cannot reasonably be accounted for by any other reasonable hypothesis than that of guilt, is erroneous.[40] Also the giving of an instruction that the jury may infer the main fact in issue from facts and circumstances

486, 488; Ashlock v. Linder, 50 Ill. 169; Eames v. Blackhart, 12 Ill. 195, 198; Izler v. Manchester & A. R. Co. 57 S. Car. 332, 35 S. E. 583; Omaha Fair & E. Asso. v. Missouri Pac. R. Co. 42 Neb. 105, 60 N. W. 330; Cook v. Brown, 39 Me. 443; Union M. L. Ins. Co. v. Buchanan, 100 Ind. 63; City of Columbus v. Strassner, 138 Ind. 301, 34 N. E. 5; Graves v. Colwell, 90 Ill. 612; Stanley v. Montgomery, 102 Ind. 102, 26 N. E. 213.

[34] Tyler, Ullman & Co. v. Western U. Tel. Co. 60 Ill. 421, 434, 14 Am. R. 38; Robbins v. P. 95 Ill. 178; Graves v. Colwell, 90 Ill. 612; Hamilton v. P. 29 Mich. 195. See Carlton v. P. 150 Ill. 181, 37 N. E. 244.

[35] Pittsburg, Ft. W. & C. R. Co. v. Callaghan, 157 Ill. 406, 41 N. E. 909; Continental Life Ins. Co. v. Yung, 113 Ind. 159, 15 N. E. 220, 3 Am. St. 630, note; P. v. Walden, 51 Cal. 588; Newman v. McComas, 43 Ind. 70; Mayer v. Wilkins, 37 Fla. 244, 19 So. 632; Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.), 75.

[36] Com. v. Walsh, 162 Mass. 242, 38 N. E. 436.

[37] Otmer v. P. 76 Ill. 149. See, also, P. v. Chartoof, 75 N. Y. S. 1088, 72 App. Div. 555.

[38] Otmer v. P. 76 Ill. 149; Sims v. S. 43 Ala. 33.

[39] Sims v. S. 43 Ala. 33.

[40] Webb v. S. 73 Miss. 456, 19 So. 238.

in evidence is error where a case is closely contested on a material and vital point in issue.[41]

§ 310. Circumstances must be consistent with guilt.—Where a conviction depends upon circumstantial evidence alone, the facts and circumstances relied upon ought not only to be consistent with the defendant's guilt, but inconsistent with every other rational conclusion before a conviction is warranted; and an instruction which fails to so state to the jury is fatally defective.[42] The facts and circumstances proved must also exclude every other reasonable hypothesis except the guilt of the defendant before a conviction can be had. Hence an instruction based upon such evidence which fails to require proof to that degree of certainty is erroneous.[43] But the refusal to give such an instruction may not be error if the instructions, given on reasonable doubt, burden of proof, presumption of innocence and the like, are full, clear and comprehensive.[44] And although an instruction as to circumstantial evidence may be erroneous, yet, as a general rule, if others given correctly state the law, the error will be regarded as harmless.[45]

§ 311. Essential facts need only be consistent.—But the rule thus requiring that the facts and circumstances shown in evidence must be consistent with the defendant's guilt and inconsistent with every other rational conclusion, relates to the essential, indispensable facts or circumstances, and not to facts or circumstances which might be eliminated from the case, and there would still remain sufficient material facts to warrant a con-

[41] Snowden v. Waterman, 105 Ga. 384, 31 S. E. 110.

[42] Harris v. S. 34 Tex. Cr. App. 494, 31 S. W. 388; Hamilton v. S. 96 Ga. 301, 22 S. E. 528; Brown v. S. 108 Ala. 18, 18 So. 811; Cavender v. S. 126 Ind. 48, 25 N. E. 875; Smith v. S. 35 Tex. Cr. App. 618; Wantland v. S. 145 Ind. 38, 43 N. E. 931; Kollock v. S. 88 Wis. 663, 60 N. W. 817; S. v. Andrews, 62 Kas. 207, 61 Pac. 808; Gonzales v. S. (Tex. Cr. App.), 57 S. W. 667; P. v. Dick, 32 Cal. 216; S. v. Asbell, 57 Kas. 398, 46 Pac. 770; Gill v. S. 59 Ark. 422, 27 S. W. 598; Longly v. Com. 99 Va. 807, 37 S. E. 339; Davis v. S. 51 Neb. 301, 70 N. W. 984. Contra: Jones v. S. 61 Ark. 88, 32 S. W. 81.

[43] Jones v. S. 34 Tex. Cr. App. 490, 30 S. W. 1059; Wantland v. S. 145 Ind. 38, 43 N. E. 931; Smith v. S. 35 Tex. Cr. App. 618, 33 S. W. 339. See, also, Reynolds v. S. 147 Ind. 3, 46 N. E. 31.

[44] S. v. Seymour, 94 Iowa, 699, 63 N. W. 661; Tatum v. S. 61 Neb. 229, 85 N. W. 40. See Jones v. S. 61 Ark. 88, 32 S. W. 81; Hamilton v. S. 96 Ga. 301, 22 S. E. 528; Barrow v. S. 80 Ga. 191, 5 S. E. 64.

[45] P. v. Dole, 122 Cal. 486, 55 Pac. 581, 68 Am. St. 50.

viction if established beyond a reasonable doubt. It is therefore proper to refuse to instruct that if a single circumstance proved is inconsistent with the guilt of the accused, the jury should acquit him; they should be restricted to the material, essential facts or circumstances.[46] There may be facts or circumstances proved in a case not at all essential to a conviction. Such facts need not be established beyond a reasonable doubt. The instruction should relate to the material facts or circumstances.[47] Or an instruction that each of the several circumstances must be proved beyond a reasonable doubt, and must not only point with moral certainty to the guilt of the defendant, but must exclude to a moral certainty every other reasonable hypothesis, is likewise improper.[48] Only each essential element constituting the crime charged need be proved beyond a reasonable doubt, and not each circumstance, though important in determining the guilt or innocence of the accused.[49]

§ 312. Essential facts—Degree of proof.—It is a fundamental principle of the law of circumstantial evidence that each independent essential fact must be proved in the same satisfactory manner as if the whole issue rested upon the proof of that fact.[50] In other words, each of such essential facts must be established to the same degree of certainty as if it were the main fact.[51] According to this rule it is proper to instruct that "when the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to the existence of one of the facts essential to establish guilt, it is the duty of the jury to acquit."[52]

[46] P. v. Willett, 105 Mich. 110, 62 N. W. 1115. See S. v. Seymore, 94 Iowa, 699, 63 N. W. 661; Price v. S. 114 Ga. 855, 40 S. E. 1015; Leonard v. Ter. 2 Wash. Ter. 397, 7 Pac. 872; S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. 655; Claire v. P. 9 Colo. 122, 10 Pac. 799 (condemning the use of the word "chain," preferring the "cable" metaphor in referring to the facts); Rayburn v. S. (Ark.), 63 S. W. 356 (condemning "links in a chain," preferring "threads or strands making a rope or cord" of evidence).

[47] Chilesler v. S. 33 Tex. Cr. App. 635, 28 S. W. 683.

[48] Kollock v. S. 88 Wis. 663, 60 N. W. 817.

[49] S. v. Gallivan, 75 Conn. 326, 53 Atl. 731, 96 Am. St. 203.

[50] S. v. Crabtree, 170 Mo. 642, 71 S. W. 130; P. v. Stewart, 75 Mich. 21, 42 N. W. 662; Harrison v. S. 6 Tex. App. 42. But see Smith v. S. 61 Neb. 296, 85 N. W. 49; S. v. Young, 9 N. Dak. 165, 82 N. W. 420; Graves v. P. 18 Colo. 181, 32 Pac. 63.

[51] Johnson v. S. 18 Tex. App. 385.

[52] P. v. Anthony, 56 Cal. 397.

The decisions which do not approve of this form of instruction condemn it principally for the use of the words "chain of circum-

Where circumstantial evidence alone is relied upon for a conviction, each necessary link and each and every material fact upon which a conviction depends, must be proved beyond a reasonable doubt, and, of course, the jury should be instructed accordingly, and a refusal to so instruct is error.[53]

So a charge based upon circumstantial evidence alone, that "each fact necessary to establish the guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis than that of his guilt," and producing a reasonable certainty that the accused committed the crime charged, is not objectionable.[54] Hence an instruction that the law does not require the jury to be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; that it is sufficient if taking all of the testimony together, the jury are satisfied beyond a reason able doubt of the defendant's guilt, is improper.[55]

§ 313. **Omission of words from instruction—Effect.**—The omission of the word "reasonable" or "rational" in its proper connection in the giving of an instruction on circumstantial evidence renders the instruction defective.[56] Thus an instruction

stances" or "links in the chain of facts," as tending to mislead; also because of the confusion of minor or dispensable facts with the essential indispensable facts: Graves v. P. 18 Colo. 181, 32 Pac. 63; Rayburn v. S. 69 Ark. 177, 63 S. W. 356; Clare v. P. 9 Colo. 122, 10 Pac. 799. See Bressler v. P. 117 Ill. 422, 8 N. E. 62.

[53] P. v. Aiken, 66 Mich. 460, 33 N. W. 821, 7 Am. Cr. R. 363, 11 Am. St. 512; S. v. Kruger, 7 Idaho, 178, 61 Pac. 463; P. v. Fairchild, 48 Mich. 37, 11 N. E. 773; Graves v. P. 18 Colo. 170, 32 Pac. 63; Marion v. S. 16 Neb. 349, 20 N. W. 289; P. v. Anthony, 56 Cal. 397; S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 10 Am. Cr. R. 52, 52 Am. St. 655; S. v. Furney, 41 Kas. 115, 21 Pac. 213, 8 Am. Cr. R. 137; Kollock v. S. 88 Wis. 663, 60 N. W. 817; Com. v. Webster, 5 Cush. (Mass.), 295; P. v. Phipps, 39 Cal. 333; Bressler v. P. 117 Ill. 438, 8 N. E. 62; Burrill Cr. Ev. 773, 736, 2 Thomp. Trials, § 2511, 1 Roscoe Cr. Ev. 27; S. v. Young, 9 N. Dak. 165, 82 N. W. 420. Contra: If the evidence is not entirely circumstantial: Harvey v. S. 125 Ala. 47, 27 So. 763; Morris v. S. 124 Ala. 44, 27 So. 336; Bressler v. P. 117 Ill. 438, 8 N. E. 62; S. v. Moxley, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; Davis v. S. 74 Ga. 869; Arismendis v. S. 41 Tex. Cr. App. 374, 54 S. W. 599; S. v. Cohen, 108 Iowa, 208, 78 N. W. 857; P. v. McArron, 121 Mich. 1, 79 N. W. 944.

[54] Baldez v. S. (Tex. Cr. App.), 35 S. W. 664; Crow v. S. 33 Tex. Cr. App. 264, 26 S. W. 209.

[55] S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. St. 655.

[56] Crawford v. S. 112 Ala. 1, 21 So. 214. See S. v. Glass, 5 Ore. 81.

charging that if the facts in evidence can be explained upon any other hypothesis than that of the guilt of the defendant, he should be acquitted, is defective, in that it omits the word reasonable in connection with the word "hypothesis."[57]

An instruction on circumstantial evidence which omits to state that the guilt of the accused must be established beyond a reasonable doubt before a conviction can be had is erroneous.[58] But an error in the giving of an instruction on circumstantial evidence, caused by omitting the element of reasonable doubt, is harmless where other instructions in various forms call for proof of guilt beyond a reasonable doubt.[59] So the omission to charge as to reasonable doubt is not material error where the court, in charging on circumstantial evidence, states that the facts established must not only be consistent with the defendant's guilt, but must also exclude every other reasonable hypothesis before a conviction can be had.[60]

§ 314. Omission of words not fatal—Illustrations.—A charge that "a few facts or multitude of facts proved, all consistent with the supposition of guilt are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant committed the crime, but they must be inconsistent with any other rational conclusion," is a proper statement of the law, and the refusal to give it is error.[61] An instruction on circumstantial evidence charging that the facts shown in evidence and relied upon for a conviction must be consistent with each other and with the guilt of the accused, and taken together, must be of a conclusive nature, producing a reasonable and moral certainty that the defendant, and no other person, committed the crime charged, properly states the law.[62]

[57] Johnson v. S. 53 Neb. 103, 73 N. W. 463; Walker v. S. 117 Ala. 42, 23 So. 149; McClelland v. S. 117 Ala. 140, 23 So. 653.

[58] Lipscomb v. S. 75 Miss. 559, 23 So. 210.

[59] Bird v. S. 43 Fla. 541, 30 So. 655.

[60] Young v. S. 95 Ga. 456, 20 S. E. 270. Instructions on circumstantial evidence held not erroneous when considered with others given: Wells v. S. 99 Ga. 206, 24 S. E. 853; Jenkins v. S. 62 Wis. 49, 21 N. W. 232.

[61] S. v. Andrews, 62 Kas. 207, 61 Pac. 808. See Roberts v. S. 110 Ga. 253, 34 S. E. 203. See S. v. David, 131 Mo. 380, 33 S. W. 28. See Villereal v. S. (Tex. Cr. App.), 61 S. W. 715 (giving a complete charge on circumstantial evidence in one instruction).

[62] Crow v. S. 37 Tex. Cr. App. 295, 39 S. W. 574; Hill v. S. (Tex.

A charge that "when a conviction is sought alone upon circumstantial evidence, the circumstances relied upon, taken together, must be incapable of explanation upon any other rational hypothesis but that of the defendant's guilt" properly states the law of circumstantial evidence.[63] So an instruction on circumstantial evidence is sufficient if it states that the jury must exhaust every reasonable hypothesis or conclusion other than that of the guilt of the defendant before they can convict, although it does not state that the evidence must show that the defendant, and "no other person," committed the offense charged.[64]

§ 315. Illustrations of the rules.—A charge that if one set or chain of circumstances leads to two opposing conclusions, one or the other of such conclusions must be wrong, and therefore, in such a case, if the jury have a reasonable doubt as to which of said conclusions the chain of circumstances leads, a reasonable doubt would thereby be created, and they should give the defendant the benefit of such doubt and acquit him, is improper, for the reason that both these "opposing conclusions" might lead to the defendant's guilt.[65] An instruction charging that "to justify the inference of legal guilt from circumstantial evidence, the existence of the inculpatory facts must be established absolutely and to a demonstration incompatible with the innocence of the accused," is improper, in that it calls for a greater degree of certainty than the law requires.[66] Absolute moral certainty excludes not only reasonable doubt, but all doubt.[67] Also an instruction on circumstantial evidence direct-

Cr. App.), 35 S. W. 660; S. v. Davenport, 38 S. Car. 348, 17 S. E. 37.

[63] Crutchfield v. S. 7 Tex. Cr. App. 65; Hunt v. S. 7 Tex. Cr. App. 212.

[64] Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61; Ramirez v. S. 43 Tex. Cr. App. 455, 66 S. W. 1101; S. v. David, 131 Mo. 380, 33 S. W. 28.

[65] P. v. Clarke, 130 Cal. 642, 63 Pac. 138.

[66] P. v. Bellamy, 109 Cal. 610, 42 Pac. 236; Carlton v. P. 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346. See Jenkins v. S. 35 Fla. 737, 18 So. 182; Mose v. S. 36 Ala. 211; P. v. Davis, 64 Cal. 440; P. v. Anthony, 56 Cal. 397.

[67] S. v. Glass, 5 Ore. 82. "Absolute moral certainty is not attainable by the human mind It describes a fixed and uncompromising attitude of the mind of which men are not capable in any of the situations of life. It means such a degree of certainty as precludes the possibility of error or mistake, and as presupposes the infallibility of witnesses and jurors. It imposes such conditions upon the administration of justice as would

ing the jury to acquit where the criminating circumstances are either denied by the accused or are explained in such a way as to render his guilt doubtful is erroneous, in that his mere denial without reference to its credibility calls for an acquittal.[68]

make the punishment of crime impossible, and the existence of criminal courts useless."

[68] Long v. S. 42 Fla. 509, 28 So. 775. An instruction that "each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt, and all the facts necessary to such conclusion must be consistent with each other, and the main fact sought to be proved; and the circumstances taken together must be of a conclusive nature leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty of the guilt of the defendant and excluding every reasonable hypothesis, except the guilt of the defendant," is properly modified by adding thereto that circumstantial evidence, to warrant a conviction need not demonstrate the guilt of the defendant beyond the possibility of his innocence, Hamlin v. S. 39 Tex. Cr. App. 579, 47 S. W. 656.

CHAPTER XXI.

ON CONFESSIONS—ADMISSIONS.

Sec.
316. Weight of confession is for the jury.
317. Weight of confession—Improper comment.
318. Voluntary confessions—Competency.
319. Voluntary confessions—Cautionary instructions.
320. Confessions—Corroboration.
321. Instructions when no evidence—When evidence.

§ 316. **Weight of confession is for the jury.**—When admissions or confessions of a person charged with crime are properly admitted in evidence, the weight and credibility thereof are to be treated and considered by the jury precisely the same as any other evidence. It is the province of the jury to determine whether a confession is true; and hence, if they believe the whole confession to be true, they will act upon the whole as the truth. But if warranted by the evidence, the jury may believe that part of the confession which makes against the accused and reject that part which is in his favor. An instruction in proper form embracing this principle has been approved.[1]

The weight of the evidence of a confession is a question for the jury, and should be the subject of appropriate instructions.[2] And in determining what credit should be given to a confession, the jury are entitled to know the circumstances under which it was given,[3] and the evidence thereof should be con-

[1] Jackson v. P. 18 Ill. 271; S. v. Gunter, 30 La. Ann. 537. See Keith v. S. 157 Ind. 376, 61 N. E. 716; S. v. Derrick, 44 S. Car. 344, 22 S. E. 337; S. v. Peck, 85 Mo. 190; S. v. Curtis, 70 Mo. 594.

[2] Williams v. S. 63 Ark. 527, 39 S. W. 709.

[3] S. v. Brennan, 164 Mo. 487, 65 S. W. 325.

sidered, together with all the other evidence introduced.[4] Thus if the accused believed he was about to die at the time of making an alleged confession, the jury have the right to consider whether, when in such condition, he would have been likely to make a truthful or false statement as to his connection with the offense charged.[4*]

§ 317. Weight of confession—Improper comment.—It being the duty of the jury to determine the weight and credit that shall be given to a confession as evidence of guilt, the court, in the giving of instructions, should guard against intimating anything as to the value of such evidence. The court cannot state that a confession freely and voluntarily made is entitled to great weight.[5] Thus an instruction stating that "a confession freely and voluntarily made is among the best evidence known to the law, and if the jury believe from the evidence that the defendant did make such a confession they are authorized to consider this in connection with the other evidence" is improper as bearing on the weight of the evidence.[6] Or an instruction advising the jury that the voluntary confessions of the accused are, in law, to be regarded as the strongest proof against him, for the same reason, is erroneous.[7]

To charge the jury that any verbal confession made by the defendant, and written down by another, is subject to mistake, which may arise from a misunderstanding of the meaning of the defendant's words, or by using words not used by him, or by substituting the language of the person writing the statement, is improper as invading the province of the jury.[8] So an instruction that the fact that the person who is charged with the commission of a crime says nothing, but remains silent, is a circumstance to which the jury may look as a confession of guilt, is likewise improper.[9]

[4] Holland v. S. 39 Fla. 178, 22 So. 298; S. v. Tobie, 141 Mo. 547, 42 S. W. 1076.

[4*] S. v. Gorham, 67 Vt. 365, 31 Atl. 845.

[5] S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 52 Am. R. 655. See Powell v. S. (Miss.), 20 So. 4; Hogsett v. S. 40 Miss. 522; Ledbetter v. S. 21 Tex. App. 344, 17 S. W. 427. See Starr v. U. S. 164 U. S. 627, 17 Sup. Ct. 223 (stating that flight is a silent admission from which guilt may be inferred).

[6] Thompson v. S. 73 Miss. 584, 19 So. 204; Brown v. S. 32 Miss. 433; Morrison v. S. 41 Tex. 520.

[7] Morrison v. S. 41 Tex. 520.

[8] Hauk v. S. 148 Ind. 238, 46 N. E. 127.

[9] Campbell v. S. 55 Ala. 80.

§ 318. Voluntary confessions—Competency.—Confessions or admissions are not competent evidence unless they were made freely and voluntarily by the accused.[10] If any degree of influence has been exerted to induce the accused to make a confession, it is incompetent.[11]

Confessions induced by the appliances of hope or fear are not regarded as voluntarily made, and are, therefore, not to be relied on as true. A confession can never be received in evidence when the accused has been influenced to make it by any threat or promise.[12] "And the slightest menace or threat, or any hope engendered or encouraged that the prisoner's case will be lightened, meliorated or more favorably dealt with, if he will confess—either of these is enough to exclude the confession thereby superinduced."[13]

The competency of a confession, that is, whether it was freely and voluntarily made, is a question for the court, and not for the jury, to determine.[14] Hence the giving of an instruction submitting its competency to the jury for them to determine is improper.[15] Thus for the court to charge that if the jury believe from all the evidence that the defendant's confession was procured by means of fear or terror, or by hope of reward, they should disregard it, is improper.[16] Or an instruction that the jury should disregard a confession unless they believe that it was voluntarily made by the defendant is likewise improper.[17] But if the testimony as to whether a confession was or was

[10] Robinson v. P. 159 Ill. 119, 42 N. E. 375; Com. v. Preece, 140 Mass. 276, 5 N. E. 494, 5 Am. Cr. R. 107; S. v. Day, 55 Vt. 570, 4 Am. Cr. R. 105; Hughes Cr. Law, §§ 3094, 3096.

[11] Hughes Cr. Law, § 3096, citing Robinson v. P. 159 Ill. 119, 42 N. E. 375.

[12] Hughes Cr. Law, § 3098, citing Gates v. P. 14 Ill. 436, 1 Greenleaf Ev. § 219 (Redf. Ed.); Johnson v. S. 59 Ala. 37, 3 Am. Cr. R. 258; Newman v. S. 49 Ala. 9, 1 Am. Cr. R. 173; P. v. Barrie, 49 Cal. 342, 1 Am. Cr. R. 181; Gillett Indirect & Col. Ev. § 110.

By statute in Indiana a confession made under any inducement except fear produced by threats may be given in evidence with all the circumstances, Benson v. S. 119 Ind. 488, 21 N. E. 1109.

[13] Hughes Cr. Law, § 3099, citing Owen v. S. 78 Ala. 425, 6 Am. Cr. R. 206, 56 Am. R. 40.

[14] Johnson v. S. 59 Ala. 37, 3 Am. Cr. R. 258; P. v. Barker, 60 Mich. 277, 27 N. W. 539.

[15] Brown v. S. 124 Ala. 76, 27 So. 250; Dugan v. Com. 19 Ky. L. R. 1273, 43 S. W. 418; Holland v. S. 39 Fla. 178, 22 So. 298; Hunter v. S. 74 Miss. 515, 21 So. 305; Williams v. S. 37 Tex. Cr. App. 147, 38 S. W. 999; Stone v. S. 105 Ala. 60, 17 So. 114; McKinney v. S. 134 Ala. 134, 32 So. 726.

[16] Holland v. S. 39 Fla. 178, 22 So. 298.

[17] Hunter v. S. 74 Miss. 515, 21 So. 305; Williams v. S. 37 Tex. Cr. App. 147, 38 S. W. 999; Bailey v. S. 42 Tex. Cr. App. 289, 59 S. W. 900.

not voluntarily made is conflicting, then the issue may be submitted to the jury for them to determine, and the jury may regard or disregard the confession as they may determine.[18] And where the evidence is conflicting as to whether the confession was voluntarily made, it is error for the court to refuse to submit the matter to the jury by proper instruction.[19]

But the failure to instruct that the jury should be satisfied beyond a reasonable doubt that the confession was made voluntarily is not material where the court instructs generally on reasonable doubt.[20] But if the legality of the confession is not challenged or contested, then the court may properly refuse to charge that before the jury can consider confessions made by the accused they must believe he made the same voluntarily, and not through promise or improper influence.[21] It has been held that if, after evidence of a confession has been admitted, it appears by evidence subsequently admitted that such confession was not freely and voluntarily made, then the court should withdraw the evidence of such confession.[22]

§ 319. **Voluntary confessions—Cautionary instructions.**—While it is usually very necessary that some degree of care should be used in receiving the confession of one charged with the commission of crime, and much caution be employed by the jury in ascertaining its weight and sufficiency,[23] yet the court cannot properly state to the jury, as a matter of law, that confessions or admissions should, for certain reasons stated, be received with great caution, unless voluntarily made. The weight and credibility of confessions are to be determined by the jury as facts. Some confessions or admissions may be entitled to little credit, considering the circumstances under which they were made; others, if made deliberately, freely and voluntarily, may be among the most effective proofs in law, but the court cannot say, as a matter of law, that the confession in evidence

[18] Morris v. S. 39 Tex. Cr. App. 371, 46 S. W. 253; Sparks v. S. 34 Tex. Cr. App. 86, 29 S. W. 264; Paris v. S. 35 Tex. Cr. App. 82, 31 S. W. 855.

[19] Sparks v. S. 34 Tex. Cr. App. 86, 29 S. W. 264.

[20] Nix v. S. 97 Ga. 211, 22 S. E. 975.

[21] Bailey v. S. 42 Tex. Cr. App. 289, 59 S. W. 900.

[22] Holland v. S. 39 Fla. 178, 22 So. 298.

[23] Underhills Cr. Ev. § 146, citing Nobles v. S. 98 Ga. 73, 26 S. E. 64.

belongs to the one class or the other.[24] The contrary view is held to be the law in other states.[25]

Where the confessions or admissions were voluntarily and deliberately made it is not necessary to instruct the jury to receive them with caution.[26] In California such an instruction has been held as properly modified by striking out the word "great," it not being one of the statutory words relating to such admissions.[27] Hence an instruction that as a general rule the statements of witnesses as to verbal admission of a person charged with the commission of a criminal offense should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake unless voluntarily made, is erroneous, in that it invades the province of the jury.[28] Also a charge that oral admissions of a party should be received with great caution, because a witness may not have correctly understood them, or may not have correctly recollected them, is likewise erroneous.[29]

§ 320. **Confessions—Corroboration.**—The corpus delicti cannot be established by confessions alone. It must be shown by other evidence, independent of confessions or admissions of the accused.[30] When the court undertakes to state this principle in the giving of instructions the jury should be left free to pass upon and determine whether the evidence of the confession, together with the evidence of the corpus delicti, is sufficient to prove the guilt of the accused beyond a reasonable doubt. An instruction leading the jury to believe that they would be

[24] Keith v. S. 157 Ind. 376, 61 N. E. 716. See Collins v. S. 20 Tex. Cr. App. 400.

[25] Marzen v. P. 173 Ill. 60, 50 N. E. 249; S. v. Hardee, 83 N. Car. 619 (discretionary). See S. v. Jackson, 103 Iowa, 702, 73 N. W. 467. See Nobles v. S. 98 Ga. 73, 26 S. E. 64.

[26] S. v. Jackson, 103 Iowa, 702, 73 N. W. 467.

[27] P. v. Van Horn, 119 Cal. 323, 51 Pac. 538. See P. v. Sternberg, 111 Cal. 11, 43 Pac. 201.

[28] Wastl v. Montana N. R. Co. 17 Mont. 213, 42 Pac. 772; Collins v. S. 20 Tex. App. 400; Bobo v. S. (Miss.), 16 So. 755; Kaufman v. Maier, 94 Cal. 269, 29 Pac. 481; Knowles v. Nixon, 17 Mont. 473, 43 Pac. 628; Keith v. S. 157 Ind. 376, 61 N. E. 716; Morris v. S. 101 Ind. 560; Zenor v. Johnson, 107 Ind. 69, 7 N. E. 751; Runnill v. Art, 169 Mass. 341, 47 N. E. 1017; White v. Ter. 3 Wash. Ter. 397, 19 Pac. 37.

[29] Zenor v. Johnson, 107 Ind. 70, 7 N. E. 751, 36 Am. R. 166; Morris v. S. 101 Ind. 562; Keith v. S. 157 Ind. 386, 61 N. E. 716.

[30] Gore v. P. 162 Ill. 265, 44 N. E. 500; South v. P. 98 Ill. 263; P. v. Tarbox, 115 Cal. 57, 46 Pac. 896; McCulloch v. S. 48 Ind. 109, citing many cases. Hughes Cr. Law, § 3093.

authorized to convict if the evidence of the confession is corroborated by proof of the corpus delicti, is erroneous. The jury must be satisfied beyond a reasonable doubt from all the evidence that the accused is guilty before they can convict him.[31] An instruction that the defendant cannot be convicted on his own confession if not corroborated by other evidence tending to establish the corpus delicti, is properly refused where it appears that the evidence, outside of the confession, is sufficient to establish the corpus delicti.[32]

§ 321. Instructions when no evidence—When evidence.—If there is no evidence whatever tending to prove a confession, then instructions on that subject are improper, and they may be prejudicial.[33] To instruct the jury that the accused has made admissions when there is no evidence that he had, is error.[34] It is error to refuse instructions on the subject of confessions where the admissibility of the confessions is an important or controlling fact in the decision of the case.[35] But the omission to instruct on this subject is not material error where the other evidence in the case, alone, without the evidence of the confession, clearly establishes the guilt of the defendant.[36]

[31] Wimberly v. S. (Ga.), 31 S. E. 162. See Davis v. S. 105 Ga. 808, 32 S. E. 158.

[32] Tidwell v. S. (Tex. Cv. App.), 48 S. W. 184; Com. v. Tarr, 4 Allen (Mass.), 315.

[33] Knight v. S. 114 Ga. 48, 39 S. E. 928, 88 Am. St. 17; Davis v. S. 114 Ga. 104, 39 S. E. 906; Goodwin v. S. 114 Wis. 318, 90 N. W. 120; Suddeth v. S. 112 Ga. 407, 37 S. E. 747; Gentry v. S. 24 Tex. App. 80.

[34] Andrews v. S. 21 Fla. 595.

[35] S. v. Moore, 160 Mass. 443.

[36] Sellers v. S. 99 Ga. 212, 25 S. E. 178. The same rules as to admissions or statements apply to both civil and criminal cases alike. See generally the following cases: Phoenix Ins. Co. v. Gray, 113 Ga. 424, 38 S. E. 992; Lewis v. Christie, 99 Ind. 377; Tozer v. Hershey, 15 Minn. 257; Shinn v. Tucker, 37 Ark. 580; Allen v. Kirk, 81 Iowa, 658, 47 N. W. 906; Knowles v. Nixon, 17 Mont. 473, 43 Pac. 628; Stewart v. De Loach, 86 Ga. 729, 12 S. E. 1067; Newman v. Hazelrigg, 96 Ind. 377; Haven v. Markstrum, 67 Wis. 493, 30 N. W. 720.

CHAPTER XXII.

RELATING TO ALIBI.

Sec.
322. Alibi as a defense—Burden on defendant.
323. Burden—Degree of proof.
324. Burden — By preponderance, when.
325. Instructions discrediting alibi.
326. Instructions on issue—Proper and improper.
327. Instructions proper.
328. Instructions improper.

§ 322. Alibi as a defense—Burden on defendant.—The defense of an alibi is not a substantive defense, but it is a fact proper to be shown in evidence in rebuttal to the evidence of the prosecution. The state must prove that the accused was present at the time of the commission of the crime charged, that is, where his presence is essential to connect him with its commission.[1] In some jurisdictions the burden is on the defendant to establish in support of an alibi such facts and circumstances, as when considered in connection with the other evidence, create in the minds of the jury a reasonable doubt of the truth of the charge.[2] The evidence in support of an

[1] S. v. Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. St. 678; S. v. Lowry, 42 W. Va. 205, 24 S. E. 561; Gawn v. S. 13 Ohio C. C. 116, 7 Ohio Dec. 19.

[2] Hughes Cr. Law, § 2414, citing Carlton v. P. 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; Garrity v. P. 107 Ill. 162; Mullins v. P. 110 Ill. 46; Ackerson v. P. 124 Ill. 563, 16 N. E. 847; Hoge v. P. 117 Ill. 44, 6 N. E. 796; Sheehan v. P. 131 Ill. 22, 22 N. E. 818; S. v. McGarry, 111 Iowa, 709, 83 N. W. 718; S. v. Hamilton, 57 Iowa, 596, 11 N. W. 5; S. v. Beasley, 81 Iowa, 83, 50 N. W. 570. See, also, Town v. S. 111 Ala. 1, 20 So. 598; Beavers v. S. 103 Ala. 36, 15 So. 616; P. v. Pichette, 111 Mich. 461, 69 N. W. 739; Henson v. S. 112 Ala. 41, 21 So. 79; S. v. Fry, 67 Iowa, 475, 25 N. W. 738; S. v. McClellan, 23 Mont. 532, 59 Pac. 924, 75 Am. St. 558; P. v. Resh, 107 Mich. 251, 65 N. W. 99; Thompson v. Com. 88 Va. 45, 13 S. E. 304; Underhill Cr. Ev. § 152; Gutirrez v. S. (Tex. Cr. App.), 59 S. W. 274. Contra: S. v. Harvey, 131 Mo. 339, 32 S. W.

alibi should be considered in connection with all the other evidence in the case, and if on the whole evidence there is a reasonable doubt of the guilt of the accused he should be acquitted. And an instruction stating the law in this form is proper.[3]

§ 323. Burden—Degree of proof.—The burden of proof does not change when the defendant undertakes to prove an alibi; and if by reason of the evidence in support of this defense the jury should have a reasonable doubt of the guilt of the defendant he would be entitled to an acquittal, although the jury might not be able to say that the alibi was fully proved.[4] The prosecution is not relieved from the necessity of proving the actual presence of the accused at the time and place of the commission of the alleged crime when personal presence is essential.[5] So where the jury are instructed that if they entertain a reasonable doubt as to whether the defendant was present at the time and place of the commission of the alleged offense they should acquit him, sufficiently states the law without further instruction on alibi;[6] or that if the defendant was at another place before and during the commission of the crime charged, he should be acquitted, is proper.[7]

1110; Shoemaker v. Ter. 4 Okla. 118, 43 Pac. 1059; S. v. Taylor, 118 Mo. 153, 24 S. W. 449; S. v. Chee Gong, 16 Ore. 534, 19 Pac. 607; Fleming v. S. 136 Ind. 149, 36 N. E. 154.

[3] S. v. Ardoin, 49 La. Ann. 1145, 22 So. 620, 62 Am. R. 678; Barr v. P. 30 Colo. 522, 71 Pac. 392. See S. v. Taylor, 118 Mo. 167, 35 S. W. 92; S. v. Bryant, 134 Mo. 246, 35 S. W. 597; Walker v. S. 42 Tex. 360; Sheehan v. P. 131 Ill. 22, 22 N. E. 818; Underhills Cr. Ev. § 148, citing S. v. Conway, 56 Kas. 682, 44 Pac. 627; S. v. Harvey, 131 Mo. 339, 32 S. W. 1110; S. v. Lowry, 42 W. Va. 205, 24 S. E. 561; P. v. Pichette, 111 Mich. 461, 69 N. W. 739; Borrego v. Ter. 8 N. Mex. 446, 46 Pac. 349; Carlton v. P. 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; Ackerson v. P. 124 Ill. 571, 16 N. E. 847; Watson v. Com. 95 Pa. St. 422; Ware v. S. 59 Ark. 379, 27 S. W. 485; Harrison v. S. 83 Ga. 134, 9 S. E. 542; Walters v. S. 39 Ohio St. 217; Chappel v. S. 7 Caldw. (Tenn.), 92; S. v. Ward, 61 Vt. 153, 192, 17 Atl. 483; Beavers v. S. 103 Ala. 36, 15 So. 616; Bennett v. S. 30 Tex. Cr. App. 341, 17 S. W. 545; S. v. Chee Gong, 16 Ore. 538, 19 Pac. 607; Howard v. S. 50 Ind. 190; Landis v. S. 70 Ga. 651; McLain v. S. 18 Neb. 154, 24 N. W. 720; S. v. Hardin, 46 Iowa, 623, 26 Am. R. 174; Pate v. S. 94 Ala. 14, 18, 10 So. 665.

[4] Hughes Cr. Law, § 2415, citing Walters v. S. 39 Ohio St. 215, 4 Am. Cr. R. 35, 1 Bish. Cr. Proc. § 1061.

[5] S. v. Lowry, 42 W. Va. 205, 24 S. E. 561.

[6] Punk v. S. (Tex. Cr. App.), 48 S. W. 171; S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. Cr. R. 224; Long v. S. 42 Fla. 509, 28 So. 775; S. v. Spotted Hawk, 22 Mont. 33, 55 Pac. 1026. See S. v. Sutton, 70 Iowa, 268, 30 N. W. 567.

[7] P. v. Pichette, 111 Mich. 461, 69 N. W. 739; S. v. Taylor, 118 Mo. 167, 24 S. W. 449.

A charge directing the jury to acquit the defendant if his evidence raises a reasonable doubt of his guilt, correctly and sufficiently states the law as to the defense of an alibi.[8] To instruct that when the defendant undertakes to establish an alibi the evidence he introduces must, when considered with all the other evidence in the case, account for his whereabouts during the whole period of time is not improper where the jury are also properly instructed on reasonable doubt as to the whereabouts of the defendant during the time in question.[9]

§ 324. Burden—By preponderance, when.—In some jurisdictions, however, the burden is on the accused to establish the defense of an alibi by a preponderance of the evidence.[10] Under this rule an instruction that "it is the duty of the defendant, in proving an alibi, to reasonably satisfy the jury that he was elsewhere at the time of the commission of the offense," properly states the law.[11] But an instruction that an alibi can only be satisfactorily sustained by proof which renders it impossible for the accused to have committed the crime charged against him is improper.[12] So an instruction requiring the defendant to establish the defense of alibi by a preponderance of the evidence, which fails to take into consideration the principle of reasonable doubt, is erroneous.[13]

[8] S. v. Miller, 156 Mo. 76, 56 S. W. 907; S. v. Jones, 153 Mo. 457, 55 S. W. 80; S. v. Hale, 156 Mo. 112, 56 S. W. 881. Compare Shaw v. S. 102 Ga. 660, 29 S. E. 477; Bone v. S. 102 Ga. 387, 30 S. E. 845. See Towns v. S. 111 Ala. 1, 20 So. 598; Toler v. S. 16 Ohio St. 585; P. v. Pearsall, 50 Mich. 233, 15 N. W. 98; Gallagher v. S. 28 Tex. App. 247, 12 S. W. 1087; French v. S. 12 Ind. 670; S. v. Starnes, 94 N. Car. 973.

[9] P. v. Worden, 113 Cal. 569, 45 Pac. 844; West v. S. 48 Ind. 483 (whole time); Albritton v. S. 94 Ala. 76 (whole time), 10 So. 426.

[10] S. v. Rowland, 72 Iowa, 327, 33 N. W. 137; S. v. McCracken, 66 Iowa, 569, 24 N. W. 43; S. v. Hamilton, 57 Iowa, 596, 11 N. W. 5; S. v. Kline, 54 Iowa, 185, 6 N. W. 184; Lucas v. S. 110 Ga. 756, 36 S. E. 87; Thompson v. Com. 88 Va. 45, 13 S. E. 304; S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. Cr. R. 222; P. v. Kessler, 13 Utah, 69, 44 Pac. 97. Contra: McNamara v. P. 24 Colo. 61, 48 Pac. 541; S. v. Conway, 55 Kas. 323, 40 Pac. 661.

[11] Pellum v. S. 89 Ala. 28, 8 So. 83; S. v. Henry, 48 Iowa, 403. But see Beaver v. S. 103 Ala. 36, 15 So. 616; Briceland v. Com. 74 Pa. St. 469; Miller v. P. 39 Ill. 464; Wisdom v. P. 11 Colo. 175, 17 Pac. 519.

[12] Gawn v. S. 13 Ohio C. C. 116, 7 Ohio Dec. 19; McCormick v. S. 133 Ala. 202, 32 So. 268; Pollard v. S. 53 Miss. 421; Kaufman v. S. 49 Ind. 248; Stuart v. P. 42 Mich. 260, 3 N. W. 863; Beavers v. S. 103 Ala. 36, 15 So. 616; Wisdom v. P. 11 Colo, 170, 17 Pac. 519; Snell v. S. 50 Ind. 516.

[13] S. v. Hogan (Iowa), 88 N. W. 1074.

§ 325. **Instructions discrediting alibi.**—The defense of an alibi is as legitimate as any other defense, and the court should not, by instruction or otherwise, cast suspicion upon it.[14] It is a well established rule that an instruction containing language which casts suspicion upon, discredits or disparages any class of evidence, is erroneous.[15] It is not improper, however, for the court, in charging the jury, to state that evidence introduced to prove an alibi should be subjected to rigid scrutiny.[16]

§ 326. **Instructions on issue—Proper and improper.**—Where the defense to a criminal charge is an alibi, and the defendant introduces affirmative evidence tending to support it, he is entitled to an affirmative charge on the issue of alibi, and it is error for the court to refuse to so instruct.[17] It is also error to refuse to charge the jury that a reasonable doubt may arise from the evidence tending to prove an alibi.[18] The court is not required, however, to instruct on the law of alibi on its own motion. The desired instructions must be properly requested.[19]

[14] Miller v. P. 39 Ill. 465; Albin v. S. 63 Ind. 598, 3 Am. Cr. R. 295; P. v. Kelley, 35 Hun (N. Y.), 295; Line v. S. 51 Ind. 172; Simmons v. S. 61 Miss. 243; Sater v. S. 56 Ind. 378; S. v. Chee Gong, 16 Ore. 534, 19 Pac. 607; S. v. Crowell, 149 Mo. 391, 50 S. W. 893; S. v. Jaynes, 78 N. Car. 504; S. v. Lewis, 69 Mo. 92; P. v. Lattimore, 86 Cal. 403, 24 Pac. 1091; Spencer v. S. 50 Ala. 124; Dawson v. S. 62 Miss. 241. Contra: Provo v. S. 55 Ala. 222; S. v. Blunt, 59 Iowa, 468, 13 N. W. 427; S. v. Wright, 141 Mo. 333, 42 S. W. 934; P. v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

[15] Shenkenberger v. S. 154 Ind. 630, 640, 57 N. E. 519; Lewis v. Christie, 99 Ind. 377; S. v. Lewis, 69 Mo. 92; Spencer v. S. 50 Ala. 124.

[16] S. v. Rowland, 72 Iowa, 329, 33 N. W. 137; Albritton v. S. 94 Ala. 76, 10 So. 426; S. v. Blunt, 59 Iowa, 468, 13 N. W. 427.

[17] Rountree v. S. (Tex. Cr. App.), 55 S. W. 827; Arismendis v. S. (Tex. Cr. App.), 60 S. W. 47; Padron v. S. 41 Tex. Cr. App. 548, 55 S. W. 827; Tittle v. S. 35 Tex. Cr. App. 96, 31 S. W. 677; Smith v. S. (Tex. Cr. App.), 50 S. W. 362; Garcia v. S. 34 Fla. 311, 16 So. 223; S. v. Conway, 55 Kas. 333, 40 Pac. 661; Anderson v. S. 34 Tex. Cr. App. 546, 31 S. W. 673; P. v. Dick, 32 Cal. 216; S. v. Mackey, 12 Ore. 154, 6 Pac. 648, 5 Am. Cr. R. 536; S. v. Whitny, 7 Ore. 386; S. v. Kaplan, 167 Mo. 298, 66 S. W. 967; Burton v. S. 107 Ala. 108, 18 So. 284; S. v. Porter, 74 Iowa, 623, 38 N. W. 514; Wiley v. S. 5 Baxt. (Tenn.), 662; Conway v. S. 33 Tex. Cr. App. 327, 26 S. W. 401; Long v. S. 42 Fla. 509, 28 So. 775; S. v. Bryant, 134 Mo. 246, 35 S. W. 597; Fletcher v. S. 85 Ga. 666, 11 S. E. 872; Joy v. S. 41 Tex. Cr. App. 46, 51 S. W. 935; Arismendis v. S. (Tex. Cr. App.), 60 S. W. 47 (alibi sole defense); Deggs v. S. 7 Tex. App. 359 (alibi the sole defense). Contra: Conrad v. S. 132 Ind. 258, 31 N. E. 805; S. v. Ward, 61 Vt. 194, 17 Atl. 483, 8 Am. Cr. R. 224; S. v. Sutton, 70 Iowa, 268, 30 N. W. 567.

[18] Fleming v. S. 136 Ind. 149, 36 N. E. 154.

[19] Marshall v. S. 37 Tex. Cr. App. 450, 36 S. W. 86; Goldsby v. U. S. 160 U. S. 70, 16 Sup. Ct. 216;

Where there is abundant evidence of a conspiracy connecting the accused with the commission of a murder, it could make no difference whether he was or was not present when the homicide was committed; hence an instruction on alibi in such case may be properly refused.[20] An instruction that "if you believe from the evidence that the defendant was not present at the time it is alleged that the crime was committed you must acquit him," is properly refused where the defendant may have aided and abetted the crime without being personally present.[21]

But, of course, if there is no evidence introduced tending to prove the defense of alibi, an instruction as to that defense is properly refused.[22] Thus, where, in a trial for murder, the evidence shows that the killing occurred about eight o'clock, and the defendant introduced no evidence to show his whereabouts from seven-thirty to eight-fifteen, and it appearing that he could have committed the crime during that time, he cannot complain that the court failed to instruct on the defense of alibi.[23]

§ 327. Instructions proper.—A charge that evidence to establish an alibi, like any other evidence, may be open to special observation; that persons may perhaps fabricate it with greater hopes of success or less fear of punishment than most other kinds of evidence, and honest witnesses often mistake dates and periods of time and identity of people and other things about which they may testify, is proper.[24] In a case where the defense was an alibi, for the court to charge the jury that "I apprehend you will have little trouble in coming to a conclusion whether it is a case of murder. I believe it is conceded by counsel who addressed you that the killing was a felonious one," was held not to be an improper charge on the facts of the

Lyon v. S. (Tex. Cr. App.), 34 S. W. 947; Com. v. Boschim, 176 Pa. St. 103, 34 Atl. 964; S. v. Peterson, 38 Kas. 205, 16 Pac. 263; Anderson v. S. 34 Tex. Cr. App. 546, 31 S. W. 673. Contra: Fletcher v. S. 85 Ga. 666, 11 S. E. 872.

[20] S. v. Gatlin, 170 Mo. 354, 70 S. W. 885; S. v. Johnson, 40 Kas. 266, 19 Pac. 749.

[21] P. v. Feliz, 136 Cal. 19, 69 Pac. 220.

[22] Johnson v. S. (Tex. Cr. App.), 57 S. W. 805; Glover v. S. (Tex. Cr. App.), 46 S. W. 824; Morris v. S. 124 Ala. 44, 27 So. 336; Jackson v. S. (Tex. Cr. App.), 67 S. W. 497; S. v. Jackson, 95 Mo. 623, 8 S. W. 749; S. v. Seymour, 94 Iowa, 699, 63 N. W. 661.

[23] S. v. Seymour, 94 Iowa, 699, 63 N. W. 661; S. v. Murray, 91 Mo. 95, 3 S. W. 397.

[24] P. v. Wong Ah Foo, 69 Cal. 189, 10 Pac. 375.

case.[25] To charge the jury that an alibi is a good defense, if proved, is not error where in the same connection the jury are instructed that if they have a reasonable doubt as to the presence of the defendant they should acquit him.[26] An instruction in substance charging that if the jury believe from the evidence that the testimony to sustain the defense of alibi is false and fraudulent, then this is a discrediting circumstance to which the jury may look, in connection with all the other evidence, in determining the guilt or innocence of the defendant, is proper.[27] But an instruction which thus states that if the jury believe the alibi to be false, that is positive evidence of guilt, is erroneous.[28]

An instruction that "the defense of an alibi is one easily manufactured, and jurors are generally and properly advised by the courts to scan the testimony of an alibi with care and caution," is proper.[29] A charge that "if the defendant was at the time of the killing at another and different place from that at which such killing was done, and therefore was not and could not have been the person who killed the deceased, if he was killed; that if the evidence raises in your minds a reasonable doubt as to the presence of the defendant at the place where the deceased was killed, if he was killed, at the time of such killing, you will find him not guilty," is correct.[30]

§ 328. Instructions improper.—To instruct the jury that, as a rule, the defense of an alibi is open to great and manifest abuse, because of the comparative ease with which testimony to support it may be fabricated, or that this defense is often resorted to by those who are guilty, or that perjury, mistake, contrivance and deception are frequently employed and involved in supporting it, is error, as invading the province of the jury.[31] Stating to the jury that an alibi is a defense "easily fabricated,

[25] S. v. Aughtry, 49 S. Car. 285, 26 S. E. 619.

[26] S. v. Price, 55 Kas. 610, 40 Pac. 1001; P. v. Resh, 107 Mich. 251, 65 N. W. 99; P. v. Chun Heong, 86 Cal. 330, 24 Pac. 1021.

[27] Tatum v. S. 131 Ala. 32, 31 So. 369; Albritton v. S. 94 Ala. 76, 10 So. 426; Crittenden v. S. 134 Ala. 145, 32 So. 273.

[28] S. v. Manning (Vt.), 52 Atl. 1033.

[29] S. v. Blunt, 59 Iowa, 468, 13 N. 427.

[30] Walker v. S. 6 Tex. App. 576.

[31] Underhill Cr. Ev. § 153, citing S. v. Chee Gong, 16 Ore. 538, 19 Pac. 607; Murphy v. S. 31 Fla. 166, 12 So. 453; Dawson v. S. 62 Miss. 241.

that it has occasionally been successfully fabricated, and that the temptation to resort to it as a spurious defense is very great, especially in cases of importance," is highly improper as invading the province of the jury in determining the weight of the evidence.[32]

An instruction that if the jury believe from the evidence that the defendant "has attempted to prove an alibi and failed, it is a circumstance of great weight against him and proper to be considered by the jury in determining his guilt or innocence," is improper. Failing to prove an alibi should have no greater weight to convince a jury of the guilt of the accused than the failure to prove any other important fact of defense.[33] It is also improper to charge that a failure to prove an alibi may be considered in connection with any other evidence in the case tending to prove guilt.[34]

It is error to charge that if the jury do not believe that the testimony of the defense as to an alibi outweighs the testimony of the state, which connects the defendant with the offense charged, they should not believe the alibi.[35] An instruction that the defendant is not required to establish the defense of an alibi to the reasonable satisfaction of the jury is properly refused.[36] Also a charge that the burden of proving an alibi is not on the defendant is properly refused where other instructions state that it is sufficient if, from the whole evidence on both sides, including the evidence relating to the alibi, there is a reasonable doubt of the defendant's guilt, and where the charge contains further instructions as to the presumption of innocence; and that unless such presumption is overcome by evidence, the defendant should be acquitted.[37] It is error to

[32] Henry v. S. 51 Neb. 149, 70 N. W. 924; Nehms v. S. 58 Miss. 362; Sawyers v. S. 15 Lea (Tenn.), 695. Compare P. v. Wong Ah Foo, 69 Cal. 180, 10 Pac. 375.

[33] Miller v. P. 39 Ill. 465; Prince v. S. 100 Ala. 144, 14 So. 409; P. v. Malaspina, 57 Cal. 628; S. v. Jaynes, 78 N. Car. 504. See Sawyers v. S. 15 Lea (Tenn.), 695; S. v. Collins, 20 Iowa, 85; Turner v. Com. 86 Pa. St. 54; Parker v. S. 136 Ind. 293, 35 N. E. 1105. Contra: Kilgore v. S. 74 Ala. 5.

[34] Parker v. S. 136 Ind. 284, 35 N. E. 1105. See, also, Kimbrough v. S. 101 Ga. 583, 29 S. E. 39; S. v. Byers, 80 N. Car. 426.

[35] Duncan v. S. 95 Ga. 477, 22 S. E. 324.

[36] Holley v. S. 104 Ala. 100, 17 So. 102; Pate v. S. 94 Ala. 18, 10 So. 665.

[37] Emery v. S. 101 Wis. 627, 78 N. W. 145.

charge the jury that if it was possible that the defendant could have been at both places—that is, at the place of the alleged crime and where he claimed he was at the time—the proof of the alibi is of no value whatever.[38] Also a charge that "proof to establish an alibi, though not clear, may nevertheless, with other facts of the case, raise doubt enough to produce an acquittal; a reasonable doubt of the defendant's presence at the time and place necessary for the commission of the crime would necessarily raise a reasonable doubt of guilt," is improper as being misleading and argumentative.[39]

[38] Ford v. S. 101 Tenn. 454, 47 S. W. 703.

[39] James v. S. 115 Ala. 83, 22 So. 565.

CHAPTER XXIII.

INSANITY AS A DEFENSE.

Sec.
329. Insanity defined.
330. Sanity presumed — Insanity presumed to continue.
331. Insanity—Burden on defendant.
332. Insanity—Instructions may define.
333. Insanity feigned—Cautionary instructions.
334. Insanity — Instructions proper—Illustrations.
335. Insanity — Instructions improper—Illustrations.

§ **329. Insanity defined.**—Where insanity is the defense to a criminal charge, the inquiry is always to be reduced to the single question of the capacity of the accused to discriminate between right and wrong at the time of the alleged criminal act.[1] The insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right as to the particular act done, and depriving the accused of the power of choosing between them.[2]

[1] S. v. Harrison, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224 note, 9 Am. Cr. R. 638; Carr v. S. 96 Ga. 284, 22 S. E. 570, 10 Am. Cr. R. 331; S. v. Morwy, 37 Kas. 369, 15 Pac. 282; P. v. Carpenter, 102 N. Y. 238, 6 N. E. 584; S. v. Pagels, 92 Mo. 300, 4 S. W. 391; P. v. Hoin, 62 Cal. 120; S. v. Lawrence, 57 Me. 577. See Mangum v. Com. 19 Ky. L. R. 94, 39 S. W. 703; Com. v. Gerade, 145 Pa. St. 289, 22 Atl. 464; S. v. Hockett, 70 Iowa, 442, 30 N. W. 742. See Eckert v. S. 114 Wis. 160, 89 N. W. 826. Contra: Parsons v. S. 81 Ala. 577, 2 So. 854, 7 Am. Cr. R. 266.

[2] Hopps v. P. 31 Ill. 391; Lilly v. P. 148 Ill. 473, 36 N. E. 95; Dacey v. P. 116 Ill. 572, 6 N. E. 165; Meyer v. P. 156 Ill. 129, 40 N. E. 490; United States v. Faulkner, 35 Fed. 731. See, also, S. v. Nixon, 32 Kas. 212, 4 Pac. 159; Plake v. S. 121 Ind. 435, 23 N. E. 273; Goodwin v. S. 96 Ind. 550; Howard v. S. 50 Ind. 190; Wagner v. S. 116 Ind. 181, 18 N. E. 833; Conway v. S. 118 Ind. 482, 21 N. E. 285; S. v. Felter, 32 Iowa, 49; P. v. Riordan, 117 N. Y. 71, 22 N. E. 455; Tiffiany v. Com. 121 Pa. St. 180, 15 Atl. 462; Mackin v. S. 59 N. J. L. 495, 36 Atl. 1040; Genz v. S. 59 N. J. L. 488, 37 Atl. 69; P. v. Carpen-

§ 330. Sanity presumed—Insanity presumed to continue.—The law presumes every man to be sane until the contrary is shown. But this legal presumption may be overcome by evidence from either side tending to prove insanity of the accused.[3] According to this principle it is proper, in charging the jury, to instruct them that every man is presumed to be sane, and to intend the natural and usual consequences of his own acts.[4]

When insanity of a permanent type is proved to exist, it will be presumed to continue to exist until the presumption is overcome by competent evidence. But this rule does not apply to cases of occasional or intermittent insanity, but it does apply to all cases of habitual or apparently confirmed insanity of whatever nature.[5] And the refusal to give an instruction embracing this principle is error where the evidence tends to prove insanity of a permanent nature.[6] But a charge that if the defendant was insane a short time before the commission of the alleged criminal act, the presumption is that he was insane when he comitted the act, is properly refused.[7]

§ 331. Insanity—Burden on defendant.—And the burden of proof is on the defendant to overcome such presumption. The adjudged cases in this country present a vast weight of authority favorable to the doctrine that insanity as a defense must be established to the satisfaction of the jury by a preponderance of the evidence; that a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.[8] But there are numerous decisions by courts of high authority

ter, 102 N. Y. 250, 6 N. E. 584; P. v. Taylor, 138 N. Y. 406, 34 N. E. 275; S. v. Flye, 26 Me. 312; S. v. Lawrence, 57 Me. 577, 581; Parsons v. S. 81 Ala. 577, 2 So. 854.

[3] Hughes Cr. Law, § 2437, citing, Dacey v. P. 116 Ill. 572, 6 N. E. 165; Montag v. P. 141 Ill. 80, 30 N. E. 337; P. v. McCarthy, 115 Cal. 255, 46 Pac. 1073; Davis v. United States 160 U. S. 469, 16 Sup. Ct. 353, and many other cases; Sanders v. S. 94 Ind. 147; Com. v. Gerade, 145 Pa. St. 297, 22 Atl. 464.

[4] S. v. Pagels, 92 Mo. 300, 4 S. W. 931; Sanders v. S. 94 Ind. 147; S. v. Bruce, 48 Iowa, 533. See Dominick v. Randolph, 124 Ala. 557, 27 So. 481.

[5] S. v. Wilner, 40 Wis. 306, citing 1 Greenleaf Ev. §§ 42, 371, 689; Jackson v. Van Dusen, 5 Johns. (N. Y.), 144; Crouse v. Holman, 19 Ind. 30; Wry v. Wry, 33 Ala. 187; Underhill's Cr. Ev. § 156; Branstrator v. Crow (Ind.), 69 N. E. 668.

[6] S. v. Wilner, 40 Wis. 306. See Grubb v. S. 117 Ind. 277, 20 N. E. 257.

[7] P. v. Smith, 57 Cal. 130.

[8] Hughes Cr. Law, § 2435, citing, S. v. Scott, 47 La. Ann. 251, 21 So. 271, 10 Am. Cr. R. 585; Parsons v. S. 81 Ala. 577, 2 So. 854, 7 Am. Cr. R. 266; Com. v. Gerade, 145 Pa. St.

holding that where a prima facie case is made out against the defendant, he is never bound to overcome it by a preponderance of the evidence where insanity is the defense; that the burden of proof is always on the state and never shifts to the defendant;[9] that the presumption of sanity may be overcome by evidence which is sufficient to raise a reasonable doubt of the sanity of the accused at the time of the commission of the alleged criminal act, and an instruction so stating is proper.[10]

It is proper, therefore, to instruct the jury that the law presumes a man to be sane until the contrary is shown, and imposes on the accused the burden of proving insanity when set up as a defense to a criminal charge.[11] If the state shall prove, even prima facie, that the accused committed the act alleged to be criminal, and no other evidence is given, his sanity will be presumed, and if he, in his defense, offers no evidence as to his mental condition, his sanity will be regarded as proved.[12]

289, 22 Atl. 464; Coyle v. Com. 100 Pa. St. 573, 4 Cr. L. Mag. 76; Carlisle v. S. (Tex. Cr. App.), 56 S. W. 365; P. v. Nino, 149 N. Y. 317, 43 N. E. 853; King v. S. 74 Miss. 576, 21 So. 235; S. v. Larkins, 5 Idaho, 200, 47 Pac. 945; S. v. Cole, 2 Pen. (Del.), 344, 45 Atl. 391; Graves v. S. 45 N. J. L. 203, 4 Am. Cr. R. 387; Coates v. S. 50 Ark. 330, 7 S. W. 304, 7 Am. Cr. R. 585; S. v. Smith, 53 Mo. 267, 2 Green. Cr. R. 599; P. v. Wilson, 49 Cal. 13, 1 Am. Cr. R. 358; Ortwein v. Com. 76 Pa. St. 414, 1 Am. Cr. R. 298; S. v. Clevenger, 156 Mo. 190, 56 S. W. 1078; Underhill Cr. Ev. § 158.

[9] Hughes Cr. Law, § 2436, citing S. v. Crawford, 11 Kas. 32, 2 Green. Cr. R. 642; P. v. McCann, 16 N. Y. 58; Chase v. P. 40 Ill. 353; P. v. Hellick, 126 Cal. 425, 58 Pac. 918. See, also, Kelch v. S. 55 Ohio St. 152, 45 N. E. 6; P. v. McCarthy, 115 Cal. 255, 46 Pac. 1073; S. v. Shaeffer, 116 Mo. 96, 22 S. W. 447; Ford v. S. 73 Miss. 734, 19 So. 665; Walker v. P. 88 N. Y. 81, 88; Smith v. Com. 1 Duv. (Ky.), 224, 228; P. v. Holmes, 111 Mich. 364, 69 N. W. 501; Armstrong v. S. 30 Fla. 170, 204, 11 So. 618; S. v. Davis, 109 N. Car. 780, 14 S. E. 55; Underhill Cr. Ev. § 157; Guetig v. S. 66 Ind. 94; Plake v. S. 121 Ind. 433, 23 N. E. 273; McDougal v. S. 88 Ind. 24.

[10] Dacey v. P. 116 Ill. 571, 6 N. E. 165; Montag v. P. 141 Ill. 80, 30 N. E. 337; Cunningham v. S. 56 Miss. 269; Maas v. Ter. 10 Okla. 714, 63 Pac. 960; Dunn v. P. 109 Ill. 635; Langdon v. P. 133 Ill. 406, 24 N. E. 874; P. v. Garbutt, 17 Mich. 9; O'Connell v. P. 87 N. Y. 377; S. v. Bartlett, 43 N. H. 224; Myers v. P. 156 Ill. 129, 40 N. E. 490; Brotherton v. P. 75 N. Y. 159, 3 Am. Cr. R. 219; Com. v. Pomeroy, 117 Mass. 143; Plake v. S. 121 Ind. 433, 23 N. E. 273; S. v. Nixon, 32 Kas. 205, 4 Pac. 159; Ballard v. S. 19 Neb. 609, 28 N. W. 271; Davis v. United States 160 U. S. 469, 16 Sup. Ct. 353; P. v. Taylor, 138 N. Y. 398, 34 N. E. 275; Keener v. S. 97 Ga. 3881, 24 S. E. 28; S. v. Wright, 134 Mo. 404, 35 S. W. 1145; S. v. Stickley, 41 Iowa, 232, 234, Underhill Cr. Ev. § 157.

[11] S. v. Pagels, 92 Mo. 300, 4 S. W. 931; S. v. Clevenger, 156 Mo. 190, 56 S. W. 1078.

[12] Underhill Cr. Ev. § 157, citing Bolling v. S. 54 Kas. 602; O'Brien v. P. 48 Barb. (N. Y.), 280; Armstrong v. S. 30 Fla. 197, 11 So. 618; O'Connell v. P. 87 N. Y. 384;

The burden being on the defendant to overcome the presumption of sanity, an instruction that the prosecution must affirmatively establish, as part of their case, that the defendant was sane, is improper.[13]

§ 332. **Insanity—Instructions may define.**—The court, in charging the jury, may define what in law constitutes such a degree of insanity as excuses an act, which, but for the mental condition of the accused, would be a crime; but in doing so the court should avoid expressing its views of the case.[14] But the court is not authorized to state to the jury that certain facts do or do not prove insanity.[15] And the court may instruct the jury that insanity, in all its forms, is liable to become worse, until it ends in complete dementia—without expressing an opinion on the weight of the evidence.[16]

§ 333. **Insanity feigned—Cautionary instructions.**—Where the evidence warrants it, the court may caution the jury to examine into the defense of insanity that the accused shall not impose upon the court with an ingenious counterfeit of the malady. Thus it is not improper to instruct that the plea of insanity is "sometimes resorted to in cases where aggravated crimes have been committed under circumstances which afford full proof of the overt acts, and render hopeless all other means of evading punishment. While, therefore, it ought to be viewed as a not less full and complete, than it is a humane defense when satisfactorily established, yet it should be satisfactorily examined into, with care, lest an ingenious counterfeit of the malady furnish protection to guilt."[17]

So also an instruction that "if you find the accused at the time the doctor was observing him through the hole in the wall, as described by the witness, was watching to see whether he was

Com. v. Gerade, 145 Pa. St. 296, 22 Atl. 464; Dove v. S. 3 Heisk. (Tenn.), 371.

[13] P. v. Garbutt, 17 Mich. 9, 97 Am. Dec. 162; Reg. v. Layton, 4 Cox Cr. Cas. 155; S. v. Spencer, 1 Zab. (N. J.) 202.

[14] P. v. Holmes, 111 Mich. 364, 69 N. W. 501.

[15] Guetig v. S. 63 Ind. 278; Robinson v. Walton, 58 Mo. 380; S. v. Geier, 111 Iowa, 706, 83 N. W. 718; S. v. Jones, 126 N. Car. 1099, 36 S. E. 38; P. v. Hubert, 119 Cal. 216, 51 Pac. 329.

[16] Carr v. S. 96 Ga. 284, 22 S. E. 570.

[17] P. v. McCarthy, 115 Cal. 255, 46 Pac. 1073; P. v. Larrabee, 115 Cal. 158, 46 Pac. 922; P. v. Allender, 117 Cal. 81, 48 Pac. 1014; P. v. Kloss, 115 Cal. 567, 47 Pac. 459.

observed, and was regulating his conduct accordingly, it would raise a very strong presumption that he was feigning insanity, and indeed such evidence of design and calculation on his part as to be in my opinion entirely fatal to his defense of insanity," has been held not to be an improper comment on the defense of insanity where the evidence strongly tends to show that the defense was not founded in fact, but feigned.[18]

§ 334. Insanity—Instructions proper—Illustrations—Where the defendant neither admits nor denies killing the deceased, but claims that she was unconscious, an instruction charging the jury that if they believe and find from the evidence that the defendant killed the deceased, but at the time of the killing was from any cause rendered so unconscious of her acts as not to know what she was doing, they should acquit her, properly states the law.[19] A charge that evidence of insanity can have no effect in reducing the degree of the crime is not improper where other instructions are given that if the accused is insane he should be acquitted.[20]

On a plea of insanity an instruction stating that "we hear everything he says, consider everything he does; we observe his conduct on the witness stand; we don't check him in stating his testimony, because one of the purposes is to see whether he is a sane man or not," is not improper as authorizing the jury to infer that the issue on the question of insanity shall be confined to the time of the trial instead of at the time of the crime charged, where other instructions in various forms confine the inquiry as to insanity to the time of the alleged offense.[21] "The law is that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify the jury in acquitting upon that ground." Held proper.[22] Another form held proper: "Was the defendant a free agent in forming the purpose to kill the deceased? Was he at the time the act was committed capable

[18] McKee v. P. 36 N. Y. 118.

[19] S. v. Lewis, 136 Mo. 84, 37 S. W. 806.

[20] Com. v. Hollinger, 190 Pa. St. 155, 42 Atl. 548.

[21] P. v. Burgle (Cal.), 53 Pac. 995.

[22] Ortwein v. Com. 76 Pa. St. 414, 1 Am. Cr. R. 297, Hughes Cr. Law, § 3269.

of judging whether that act was right or wrong? And did he at the time know it was an offense against the laws of God and man?"[23]

§ 335. Insanity—Instructions improper—Illustrations.—Where insanity is the defense to a charge of murder, and evidence of the insanity of relatives of the defendant is introduced, it is improper to instruct that the evidence of the insanity of such relatives should be considered only in case the jury entertain a reasonable doubt as to the defendant's sanity at the time of the commission of the act. All of the evidence should be considered in determining the mental condition of the defendant.[24] A charge stating, among other things, that "the defense of insanity has been so abused as to be brought into great discredit; that it has been the last resort to cases of unquestionable guilt, and has been an excuse to juries for acquittal," is highly prejudicial to the rights of the accused.[25]

An instruction which charges that no state of mind resulting from drunkenness, short of actual insanity or loss of reason, is any excuse for committing a crime, is erroneous where the evidence shows that the accused was intoxicated, but where there was no evidence that he had premeditated committing the crime.[26]

A charge that an attempt to commit suicide is evidence of insanity is properly refused; such act is not evidence of insanity, but only one phase of the evidence to be considered, together with all the other evidence in the case.[27] An instruction that although the defendant at the time of the commission of the crime charged was able to distinguish right from wrong, yet if he "did not possess the power to avoid the wrong and do the right, he is irresponsible and you must acquit" is erroneous and properly refused.[28] It is improper and erroneous to charge that the presumption of innocence is of so much greater strength than that of sanity that when evidence appears tending to prove insanity it compels the prosecution to establish, from

[23] Blackburn v. S. 23 Ohio St. 146, 2 Green. Cr. R. 540; Clark v. S. 12 Ohio, 494.

[24] Jones v. P. 23 Colo. 276, 47 Pac. 275.

[25] S. v. Barry, 11 N. Dak. 428, 92 N. W. 809.

[26] Latimer v. S. 55 Neb. 609, 76 N. W. 207.

[27] P. v. Owens, 123 Cal. 482, 56 Pac. 251.

[28] P. v. Bartheman, 120 Cal. 7, 52 Pac. 112.

all the evidence, beyond a reasonable doubt, the mental soundness of the accused.[29] An instruction telling the jury that if there is a single fact essential to constitute the guilt of the defendant which has not been established beyond a reasonable doubt, that is sufficient to raise a reasonable doubt, is properly refused where insanity is the defense and the only issue in the case.[30]

[29] Guetig v. S. 66 Ind. 94.

[30] S. v. Soper, 148 Mo. 217, 49 S. W. 1007. The refusal to instruct on the law as to insanity cannot be urged as error if there is no evidence tending to show insanity of the defendant at or near the time of killing, S. v. Hartley, 22 Nev. 342, 40 Pac. 372, 28 L. R. A. 33 note. Instructions on insanity are properly refused where insanity is not interposed as a defense, Johnson v. S. 100 Tenn. 254, 45 S. W. 436.

CHAPTER XXIV.

PRESUMPTIONS OF INNOCENCE.

Sec.
336. Defendant presumed to be innocent.
337. Instructions refused—When error and when not.
338. Presumption of innocence is evidence.
339. Presumption is evidence—Illustrations.

§ 336. Defendant presumed to be innocent.—In criminal cases the defendant is always presumed to be innocent of the crime charged until his guilt has been established beyond a reasonable doubt;[1] and this presumption continues in his favor throughout every stage of the trial down to and until the jury shall have reached a verdict,[2] and does not cease upon the submission of the case to the jury.[3] This is a fundamental principle of criminal law, and the defendant is entitled to have the jury properly instructed on the law of such presumption, and the refusal to so

[1] Rogers v. S. 117 Ala. 192, 23 So. 82; Salm v. S. 89 Ala. 56, 8 So. 66; Foster v. S. 89 Wis. 482, 62 N. W. 185; P. v. Willett, 105 Mich. 110, 62 N. W. 1115; P. v. Pallister, 138 N. Y. 605, 33 N. E. 741; Aszman v. S. 123 Ind. 361, 24 N. E. 123; Gardner v. S. 55 N. J. L. 17, 26 Atl. 30; P. v. Resh, 107 Mich. 251, 65 N. W. 99; P. v. Coughlin, 65 Mich. 704, 32 N. W. 905; Farley v. S. 127 Ind. 421, 26 N. E. 766; Reeves v. S. 29 Fla. 527, 10 So. 901; Long v. S. 23 Neb. 33, 36 N. W. 310; Hutts v. S. 7 Tex. App. 44; Reid v. S. 50 Ga. 556; Underhill Cr. Ev. § 17. See, also, P. v. Bowers (Cal.), 18 Pac. 660; Line v. S. 51 Ind. 172; P. v. Arlington, 131 Cal. 231, 63 Pac. 347; Garrison v. S. 6 Neb. 285; Murphy v. S. 108 Wis. 111, 83 N. W. 1112; Ter. v. Burgess, 8 Mont. 57, 19 Pac. 58; S. v. Stubblefield, 157 Mo. 360, 58 S. W. 337.

[2] S. v. Krug, 12 Wash. 288, 41 Pac. 126; Bartley v. S. 53 Neb. 310, 73 N. W. 744; S. v. Stubblefield, 157 Mo. 360, 58 S. W. 337; S. v. Howell, 26 Mont. 3, 66 Pac. 291; P. v. McNamara, 94 Cal. 515, 29 Pac. 953; P. v. Macard, 73 Mich. 26, 40 N. W. 784. See P. v. Arlington, 131 Cal. 231, 63 Pac. 347, (relating to every stage of the trial); Underhill Cr. Ev. § 18. Contra: Emery v. S. 101 Wis. 627, 78 N. W. 145; Baker v. Com. 90 Va. 820, 20 S. E. 776.

[3] P. v. O'Brien, 106 Cal. 104, 39 Pac. 325.

instruct when properly requested is reversible error;[4] but the failure to so instruct cannot be urged as error where the omission was not called to the attention of the court.[5]

§ 337. Instructions refused—When error and when not.—The refusal to instruct the jury on the law as to the presumption of the innocence of the accused when properly requested is error, although the court may fully instruct on the doctrine of reasonable doubt.[6] It is not error, however, to refuse an instruction on the presumption of innocence if the refused instruction is substantially covered by others given.[7] Thus where the court has stated to the jury that nothing can be presumed against the defendant, it is not prejudicial error to omit to charge that the defendant is presumed to be innocent, if the instructions in other respects fully and properly state the law applicable to the case.[8]

So the refusal of a specific instruction which may perhaps more definitely state the principle of such presumption is not ground for error where the general charge on the same subject can be readily understood by the jury.[9] And the giving of an instruction on the presumption of innocence may render it unnecessary to give instructions on other questions, such, for instance, as "the burden is upon the state to establish every element of the of-

[4] Rogers v. S. 117 Ala. 192, 23 So. 82; S. v. Gonce, 79 Mo. 602; Foster v. S. 89 Wis. 482, 62 N. W. 185; P. v. Willett, 105 Mich. 110, 62 N. W. 1115; Castle v. S. 75 Ind. 146; Reeves v. S. 29 Fla. 527, 10 So. 905; Coffee v. S. 5 Tex. App. 545; P. v. Potter, 89 Mich. 354, 50 N. W. 994; Farley v. S. 127 Ind. 419, 26 N. E. 898.

[5] P. v. Graney, 91 Mich. 646, 52 N. W. 66; P. v. Ostrander, 110 Mich. 60, 67 N. W. 1079; P. v. Smith, 92 Mich. 10, 52 N. W. 67; Williams v. P. 164 Ill. 481, 45 N. E. 987. See Murray v. S. 26 Ind. 141. Contra: P. v. Macard, 73 Mich. 15, 40 N. W. 784; P. v. Potter, 89 Mich. 353, 50 N. W. 994.

[6] Stokes v. P. 53 N. Y. 183; Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394; P. v. Van Houter, 38 Hun (N. Y.), 173; Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628; Vaughan v. Com. 85 Va. 671; Murray v. S. 26 Ind. 141 (exception must be taken to the refusal). Contra: S. v. Heinze, 2 Mo. App. 1314; P. v. Ostrander, 110 Mich. 60, 67 N. W. 1079.

[7] Faqua v. Com. (Ky.), 73 S. W. 782; Smith v. S. 63 Ga. 170; Murphy v. S. 108 Wis. 111, 83 N. W. 1112.

[8] P. v. Parsons, 105 Mich. 177, 63 N. W. 69. See P. v. Harper, 83 Mich. 273, 47 N. W. 221.

[9] Murphy v. S. 108 Wis. 111, 83 Wis. 1112. On the trial of a charge of murder in the first degree an instruction as to the presumption of innocence which states among other things that the defendant is presumed to be innocent "of the crime charged" relates as well to the included offenses as to the specific charge of murder in the first degree, S. v. Smith, 164 Mo. 567, 65 S. W. 270.

fense and never shifts to the defendant.'"[10] So the refusal to charge that if there is a probability of innocence there is a reasonable doubt of guilt, is not error where other instructions given properly state the law of the presumption of innocence.[11]

§ 338. **Presumption of innocence is evidence.**—The legal presumption of innocence shall be regarded as a matter of evidence to the benefit of which the defendant is entitled until his guilt is proved beyond a reasonable doubt, and a refusal to so instruct the jury when a proper instruction is requested is error.[12] A charge that the presumption of innocence "partakes of the nature of evidence, and if no evidence was introduced, then under this presumption of innocence the jury should acquit the defendant;" and that such presumption continues until the defendant is proved guilty beyond a reasonable doubt, is proper although evidence had in fact been introduced.[13] But the refusal of such an instruction is not error where the court instructs that the presumption of innocence continues until guilt is established beyond a reasonable doubt.[14]

§ 339. **Presumption is evidence—Illustrations.**—An instruction stating that every person is presumed to be innocent until his guilt has been established beyond a reasonable doubt is not erroneous in that it does not state that the guilt must be proved by competent evidence where it appears that all the evidence is competent.[15] A charge stating in substance that the law presumes the innocence of a person accused of crime and that this presumption is not merely a matter of form, to be disregarded by

[10] Huggins v. S. 42 Tex. Cr. App. 364, 60 S. W. 52; Lewis v. S. (Tex. Cr. App.), 59 S. W. 886.

[11] Allen v. United States, 164 U. S. 492, 17 Sup. Ct. 154. In Virginia it has been held that a charge that the accused comes to trial presumed to be innocent, and this presumption extends to the end of the trial, and the jury in considering the evidence should endeavor to reconcile it with this presumption, is improper as tending to mislead. Barker v. Com. 90 Va. 820, 20 S. E. 776.

[12] Bryant v. S. 116 Ala. 445, 23 So. 40; Bartley v. S. 53 Neb. 310, 73 N. W. 744; McVey v. S. 55 Neb. 777, 76 N. W. 438; Gordon v. Com. 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744. Contra: S. v. Martin, (Mont.), 74 Pac. 727.

[13] McVey v. S. 55 Neb. 777, 76 N. W. 438.

[14] McVey v. S. 55 Neb. 777, 76 N. W. 438. See Gordon v. Com. 100 Va. 825, 41 S. E. 746, 57 L. R. A. 744; S. v. Hudspeth, 159 Mo. 178, 60 S. W. 136.

[15] Dalzell v. S. 7 Wyo. 450, 53 Pac. 297; S. v. Duck, 35 La. Ann. 764; Williams v. S. 35 Tex. Cr. App. 606, 34 S. W. 943; P. v. Resh, 107 Mich. 251, 65 N. W. 99; Gallagher v. S. 28 Tex. App. 247.

the jury at their pleasure; that such presumption continues with the defendant throughout all the stages of the trial, properly states the law.[16] An instruction that "the law raises no presumption against the accused, but every presumption of the law is in favor of his innocence," is proper.[17] An instruction that the defendant, though indicted for perjury, is just as innocent of the crime as though not indicted, is erroneous.[18]

[16] S. v. Krug, 12 Wash. 288, 41 Pac. 126. Contra: Barker v. Com. 90 Va. 820, 20 S. E. 776.

[17] Ter. v. Burgess, 8 Mont. 57, 19 Pac. 558, 1 L. R. A. 808. See, also, Line v. S. 51 Ind. 172.

[18] Sanders v. P. 124 Ill. 218, 16 N. E. 81.

CHAPTER XXV.

CHARACTER OF DEFENDANT.

Sec.
340. Proof of good character proper.
341. Good character considered—Instructions.
342. Instructions on character—Refusal—When proper.
343. Good character creating reasonable doubt—Instruction.
344. Good character unavailing—When.
345. Good character—Instructions improper.
(1.) Considered as generating doubt.
(2.) Persons not likely to commit crime.
(3.) Sufficient to raise doubt.
(4.) Invading province of jury.
(5.) Ignoring evidence of.

§ 340. **Proof of good character proper.**—In every criminal prosecution the accused is entitled to prove his good character, and when proved it is itself a fact in the case—a circumstance tending in greater or less degree to establish his innocence; and the accused has a right to have it considered by the jury the same as any other fact in evidence.[1] Evidence of the good character of the accused is admissible whether the case as to his guilt or innocence is doubtful or not.[2] Therefore, to say by instruc-

[1] S. v. Van Kuran, 25 Utah, 8, 69 Pac. 60.

[2] Jupitz v. P. 34 Ill. 521; McQueen v. S. 82 Ind. 74; Steele v. P. 45 Ill. 157; S. v. Lindley, 51 Iowa, 344, 1 N. W. 484; Aneals v. P. 134 Ill. 401, 25 N. E. 1022; Com. v. Leonard, 140 Mass. 473, 7 Am. Cr. R. 598, 4 N. E. 96, 54 Am. R. 485; P. v. De La Cour Soto, 63 Cal. 165; Hall v. S. 132 Ind. 317, 31 N. E. 536; S. v. Schleagel, 50 Kas. 325, 31 Pac. 1105; Edgington v. U. S. 164 U. S. 361, 17 Sup. Ct. 72; Com. v. Wilson, 152 Mass. 12, 25 N. E. 16; Pate v. S. 94 Ala. 14, 10 So. 665; S. v. McMurphy, 52 Mo. 251, 1 Green, Cr. R. 640; S. v. Anslinger, 171 Mo. 600, 71 S. W. 1041; Stewart v. S. 22 Ohio St. 478; S. v. Honing, 49 Iowa, 158; S. v. Porter, 32 Ore. 135, 49 Pac. 964; P. v. Mead, 50 Mich. 228, 15 N. W. 95; S. v. Henry, 50 N. Car. 65; Remsen v. P. 57 Barb. (N. Y.), 324, 43 N. Y. 6; Holland v. S. 131 Ind. 572, 31 N. E. 359; Hammond v. S. 74 Miss. 214, 21 So. 149.

tion that evidence of the good character of the defendant can be considered by the jury only in cases where the other evidence leaves it doubtful whether the defendant is guilty or not, is error.[3]

So a charge that "evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong," is erroneous in that it invades the province of the jury.[4] Also an instruction charging that "evidence of previous good character may be considered by you in connection with all the other evidence given in the cause in determining whether the defendant would likely commit the crime with which he is charged; and if you find from all the evidence in the cause, independent of the evidence of his good character, that there is a reasonable doubt, then you should give him the benefit of good character and acquit him; but if you should find from all the evidence given in the cause independent of the evidence of previous good character that the defendant did commit the crime or was present aiding or abetting, encouraging, counseling, directing and assisting in the same, evidence of previous good character would not avail him anything, and you should find him guilty," is erroneous in that it deprives the defendant of the benefit of his evidence of good character.[5] The weight that ought to be given to evidence of good character does not depend upon the grade of the crime, and an instruction that it does is erroneous.[6]

§ 341. Good character considered—Instructions.—It is the duty of the jury to consider the evidence of the previous good character of the accused together with all the other evidence in the case in determining his guilt or innocence. They must con-

[3] Rowe v. U. S. 97 Fed. 779; Jupitz v. P. 34 Ill. 516, 521; P. v. Hancock, 7 Utah, 170, 25 Pac. 1093; Edgington v. U. S. 164 U. S. 361, 17 Sup. Ct. 72; Powers v. S. 74 Miss. 777, 21 So. 65; P. v. Don Pedro, 43 N. Y. S. 44, 19 Misc. 300. See P. v. Dippold, 51 N. Y. S. 859, 30 App. Div. 62; S. v. Holmes, 65 Minn. 230, 68 N. W. 11; Com. v. Leonard, 140 Mass. 473, 4 N. E. 96; S. v. Henry, 50 N. Car. 65; Donaldson v. S. 10 Ohio C. C. 613; Hammond v. S. 74 Miss. 214, 21 So. 149; Com. v. Cleary, 135 Pa. St. 64, 19 Atl. 1017; Felix v. S. 18 Ala. 725; Stewart v. S. 22 Ohio St. 478; S. v. Kinley, 43 Iowa, 296; S. v. Daley, 53 Vt. 442.

[4] Vincent v. S. 37 Neb. 672, 56 N. W. 320.

[5] Holland v. S. 131 Ind. 568, 31 N. E. 359.

[6] Harrington v. S. 19 Ohio St. 268; Cancerni v. P. 16 N. Y. 501.

sider whether the evidence of such good character, when weighed and considered with all the other evidence, raises a reasonable doubt as to the guilt of the accused.[7] Such evidence should be submitted to the jury as any other evidence without any intimation as to its value or without any disparagement.[8] The evidence of the good character of the accused should be mentioned in connection with the other evidence in the case in charging the jury, and not disconnected from it.[9]

§ 342. Instructions on character—Refusal—When proper.—If there is no evidence as to the good character of the defendant the court may properly refuse to instruct in that respect.[10] Thus an instruction that the defendant's character cannot be assailed unless he himself puts it in issue by introducing evidence in its support, is improper where the defendant has offered no evidence as to his character; it suggests the inference that the prosecution might have shown the bad character of the defendant had it been permitted to do so.[11] It is not error to refuse an instruction as to the good character of the accused if it is substantially embodied in others given.[12]

§ 343 Good character creating reasonable doubt—Instruction. The accused is entitled to an instruction that good character may of itself create a reasonable doubt where otherwise no such doubt would exist.[13] So an instruction that if in the judgment of the jury

[7] S. v. Keefe, 54 Kas. 197, 38 Pac. 302; Olds v. S. (Fla.), 33 So. 296. See Crump v. Com. (Va.), 23 S. E. 700.

[8] Powers v. S. 74 Miss. 777, 21 So. 657; Latimer v. S. 55 Neb. 609, 76 N. W. 207; Moran v. S. 11 Ohio C. C. 464; P. v. Casey, 53 Cal. 392.

[9] Crawford v. S. 112 Ala. 1, 21 So. 214; P. v. Hoagland, 137 Cal. 218, 69 Pac. 1063.

[10] Williams v. P. 166 Ill. 136, 46 N. E. 749; S. v. Gartrell, 171 Mo. 489, 71 S. W. 1045. See S. v. Furgeson, 162 Mo. 668, 63 S. W. 101.

[11] P. v. Gleason, 122 Cal. 370, 55 Pac. 123.

[12] White v. U. S. 164 U. S. 100, 17 Sup. Ct. 38; Com. v. Wilson. 152 Mass. 12, 25 N. E. 16; P. v. Johnson, 61 Cal. 142; S. v. McNamara, 100 Mo. 100 (holding that the refusal of a proper instruction is not error), 13 S. W. 938; P. v. Spriggs, 58 Hun (N. Y.), 603, 11 N. Y. S. 433.

[13] P. v. Elliott, 163 N. Y. 11, 57 N. E. 103; Lowenberg v. P. 5 Park. Cr. (N. Y.), 414; Bryant v. S. 116 Ala. 445, 23 So. 40; S. v. Vankuran, 25 Utah, 8, 69 Pac. 60 (good character may satisfy the jury of the innocence of the defendant); Bankhead v. S. 124 Ala. 14, 26 So. 979; Aneals v. P. 134 Ill. 415, 25 N. E. 1022; P. v. Bell, 49 Cal. 489. See, also, S. v. Porter, 32 Ore. 135, 49 Pac. 964; Heine v. Com. 91 Pa. St. 145; P. v. Bell, 49 Cal. 485. Contra: Scott v. S. 105 Ala. 57, 16 So. 925; Briggs v. Com. 82 Va. 554; Powers v. S. 74 Miss. 777, 21 So. 657.

the evidence of good character raises a reasonable doubt against positive evidence, they have the right to entertain such doubt, and the defendant should have the benefit of it, properly states the law.[14] It is not proper, however, to instruct that evidence of good character is admissible for the purpose of creating a reasonable doubt.[15] Also that good character is of importance to a person charged with the commission of a criminal offense, and that the jury have the right to consider whether a person of good character would be less liable to be guilty of the commission of crime than a person of bad character, is proper.[16]

§ 344. Good character unavailing—When.—If, however, the evidence clearly and conclusively establishes the guilt of the accused beyond a reasonable doubt, the jury should find him guilty, notwithstanding his former good character. Hence, an instruction charging that if from the evidence the jury believe the defendant is guilty, then his previous good character neither justifies, mitigates, nor excuses the offense, is proper.[17] Also an instruction that if after full consideration of all the evidence adduced (including the evidence of good character), the jury believe the defendant to be guilty of any degree of the crime charged, they should so find, notwithstanding proof of good character, correctly states the law.[18]

§ 345. Good character—Instructions improper.—(1) *Considered as generating doubt*: A charge which states that "the good character of the defendant if proved, is not only evidence of innocence, but it may be considered by the jury for the purpose of generating doubt," is improper, in that it tends to mislead the jury on the question of reasonable doubt.[19] Also charging that good character, if proved, may sometimes have the effect of generating such doubt as would authorize an acquittal, even

[14] P. v. Hughson, 154 N. Y. 153, 47 N. E. 1092.

[15] S. v. Cushing, 17 Wash. 544, 50 Pac. 512.

[16] P. v. Harrison, 93 Mich. 597, 53 N. W. 725.

[17] S. v. Jones, 78 Mo. 282; S. v. Leppere, 66 Wis. 355, 28 N. W. 376; Com. v. Eckerd, 174 Pa. St. 137, 34 Atl. 305; P. v. Samsels, 66 Cal. 99, 4 Pac. 1061; P. v. Mitchell, 129 Cal. 584, 62 Pac. 187; S. v. Vansant, 80 Mo. 70; S. v. Spooner, 41 La. Ann. 780, 6 So. 879; Creed v. P. 81 Ill. 565; S. v. Porter, 32 Ore. 135, 49 Pac. 964; P. v. Brooks, 61 Hun (N. Y.) 619, 15 N. Y. S. 362; S. v. Darrah, 152 Mo. 522, 54 S. W. 226.

[18] P. v. Smith, 59 Cal. 601.

[19] Johnson v. S. 102 Ala. 1, 16 So. 99; Eggleston v. S. 129 Ala. 80, 30 So. 582; Miller v. S. 107 Ala. 40, 19 So. 37; Webb v. S. 106 Ala. 52, 18 So. 491.

when the jury would otherwise have entertained no doubt, and that the defendant may introduce evidence of his previous good character for the purpose of generating a doubt of his guilt, has been declared to be improper, as giving undue prominence to the evidence of good character.[20]

(2.) *Person not likely to commit crime*: So a charge that "if you find good character established by the evidence you should consider it and allow it such weight as you believe it fairly entitled to, as tending to show that men of such character would not be likely to commit the crime charged," is erroneous in that it does not expressly refer to the good character of the accused, and is somewhat argumentative.[21]

(3) *Sufficient to raise the doubt*: Also a charge that the good character of the defendant, if shown, is of itself sufficient to raise a reasonable doubt, is improper[22]

(4.) *Invading province of jury*: A charge that if from all the evidence the jury have any reasonable doubt of the guilt of the defendant, and if they further believe from the evidence that the defendant has for a long time possessed and now possesses a good moral character for peace, sobriety, and honesty, then such fact of good character, coupled with the presumption of innocence which the law invokes is sufficient upon which to find a verdict of not guilty, is improper as invading the province of the jury.[23]

(5.) *Ignoring evidence of*: The defense in rebuttal having introduced evidence tending to show that the reputation of the accused for truth, honesty and integrity was good, the court erred in charging the jury that they should draw no unfavorable inference of the defendant from the fact that she had offered no evidence as to her general good character.[24]

[20] Goldsmith v. S. 105 Ala. 8, 16 So. 933; Crawford v. S. 112 Ala. 1, 21 So. 214.

[21] Dorsey v. S. 110 Ala. 38, 20 So. 450.

[22] Hammond v. S. 74 Miss. 214, 21 So. 149.

[23] S. v. McNamara, 100 Mo. 100, 13 S. W. 938.

[24] S. v. Marks, 16 Utah, 204, 51 Pac. 1089. Where evidence of the character of the defendant and other witnesses has been introduced on both sides, a general instruction that such evidence should be considered on the credibility of the witnesses is not erroneous and does not limit the effect of it to the defendant's credibility, nor deprive him of the right to have it considered on the issue of his guilt or innocence. S. v. Olds, 106 Iowa, 110, 76 N. W. 644.

CHAPTER XXVI.

OBJECTIONS AND EXCEPTIONS.

Sec.
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§ 346. **Method and manner of taking exceptions.**—As a general rule exceptions to the giving or refusing of instructions must be properly taken in the trial court before the assignment of errors thereon will be considered by a court of review.[1] Under statutory provisions in some jurisdictions the exceptions to instructions must be signed by the judge presiding, and if not signed they will not be the subject of review on appeal or writ of error.[2] And the exceptions must be signed by the judge pre-

[1] West C. St. R. Co. v. Martin, 154 Ill. 523, 39 N. E. 140; Buckmaster v. Cool, 12 Ill. 74; Burnette v. Town of Guyers, 106 Wis. 618, 82 N. W. 564; Barker v. Lawrence Mfg. Co. 176 Mass. 203, 76 N. E. 366; Gracie v. Stevens, 171 N. Y. 658, 63 N. E. 1117; Bruen v. P. 206 Ill. 425, 69 N. E. 24; First Nat. Bank v. Tolerton (Neb.), 97 N. W. 248.

[2] Central R. Co. v. Coleman, 80 Md. 328, 30 Atl. 918; Ayres v. Blevins, 28 Ind. App. 101, 62 N. E. 305; Hutchinson v. Lerncke, 107 Ind.

siding, although the instructions were given on the court's own motion.[3]

The taking of exceptions, to be of any avail on review, must extend to all the instructions on the same subject considered together. An exception to detached portions of instructions will not be considered.[4] The indorsement on instructions of the words "given and excepted to at the time by the defendant," and signed by the court, is not sufficient under a statute which provides that "it shall be sufficient to write on the margin or at the close of each instruction, 'refused and excepted to, or given and excepted to,' " which memorandum shall be signed by the judge, in that it omits the date which is quite as material as the signature.[5]

§ 347. Time of taking exceptions.—Objections to instructions cannot be raised for the first time in the reviewing court on appeal or writ of error.[6] Thus, an objection that the court instructed the jury orally instead of in writing, comes too late when raised for the first time on appeal.[7] The record must show that exceptions were taken at the time the instructions were given or refused, to be of any avail.[8] Where an exception appears

121, 8 N. E. 71; Board v. Legg, 110 Ind. 486, 11 N. E. 612; McKinsey v. McKee, 109 Ind. 209, 9 N. E. 771; Mason v. Seiglitz, 22 Colo. 320, 44 Pac. 588. See Moore v. Brown (Tex. Cv. App.), 64 S. W. 946.

[3] Silver v. Parr, 115 Ind. 113, 17 N. E. 114. An exception to the ruling of the court need not be in a technical term, such as "I except." Woolsey v. Lasher, 54 N. Y. S. 737.

[4] Bell v. City of Spokane, 30 Wash. 508, 71 Pac. 31; Gray v. Washington Water P. Co. 30 Wash. 665, 71 Pac. 206.

[5] Malott v. Hawkins, 159 Ind. 137, 63 N. E. 308; Behymer v. S. 95 Ind. 140; Roose v. Roose, 145 Ind. 162, 44 N. E. 1; Williams v. Chapman, 160 Ind. 130, 66 N. E. 460.

[6] Cathey v. Bowen, 70 Ark. 348, 68 S. W. 31; Jenkins v. Mammoth Min. Co. 24 Utah, 513, 68 Pac. 845; Thompson v. Security T. & L. Ins. Co. 63 S. Car. 290, 41 S. E. 464; Gumby v. Metropolitan St. R. Co. 171 N. Y. 635, 63 N. E. 1117; Fruchey v. Eagleson, 15 Ind. App. 88, 43 N. E. 146; Keens v. Robertson, 46 Neb. 837, 65 N. W. 897; Romberg v. Hediger, 47 Neb. 201, 66 N. W. 283; Hall v. Incorporated Town, 90 Iowa, 585, 58 N. W. 881; Price v. Hallett, 138 Mo. 561, 38 S. W. 451; Turner v. Goldsboro Lumber Co. 119 N. Car. 387, 26 S. E. 23; Dawson v. Coston, 18 Colo. 493, 33 Pac. 189; Peck v. Boggess, 2 Ill. (1 Scam.), 285; Tomlinson v. Wallace, 16 Wis. 234; Carter v. Missouri M. & L. Co. 6 Okla. 11, 41 Pac. 356; P. v. Caldwell, 107 Mich. 374, 65 N. W. 213; Franklin v. Claflin, 49 Md. 24; S. v. Probasco, 46 Kas. 310, 26 Pac. 749; Lawrence v. Bucklen, 45 Minn. 195, 47 N. W. 655; McDaneld v. Logi, 143 Ill. 487, 32 N. E. 423. Contra: Gonzales v. S. 35 Tex. Cr. App. 339, 33 S. W. 363.

[7] Bowling v. Floyd (Kas.), 48 Pac. 875.

[8] Washington County Water Co. v. Garver, 91 Md. 398, 46 Atl. 979;

in regular order upon the record, immediately following the instruction to which exception was taken, it will be presumed by the reviewing court that the exception was taken at the time the instructions were given.[9]

In some jurisdictions the exceptions relating to instructions must be taken before the jury retire to consider the case.[10] But in some of the states exceptions may be taken at any time before the verdict of the jury.[11] It follows from what has been said that the taking of exceptions after the verdict is too late to be considered on appeal.[12] And of course it is too late to object to

Loewenstein v. Bennett, 19 Ohio C. C. 616; Taylor v. Pullen, 152 Mo. 434, 53 S. W. 1086; Zingrebe v. Union R. Co. 60 N. Y. S. 913; Frenkmann v. Schneider, 64 N. Y. S. 111; Snowden v. Town of Somerset, 64 N. Y. S. 1088; Willard v. Petitt, 153 Ill. 663, 667, 39 N. E. 991 (Illinois cases reviewed); East St. Louis Elec. R. Co. v. Stout, 150 Ill. 9, 36 N. E. 963; S. v. Dewitt, 152 Mo. 76, 53 S. W. 429 (oral instructions); Vaughn v. Ferrall, 57 Ind. 182; S. v. Sacre, 141 Mo. 64, 41 S. W. 905; Barr v. City of Omaha, 42 Neb. 341, 60 N. W. 591; S. v. Hathaway, 100 Iowa, 225, 69 N. W. 449; U. S. Sugar Refiner v. Providence Steam & G. P. Co. 62 Fed. 375; Bradford Glycerine Co. v. Kizer, 113 Fed. 894; Bluff City Lumber Co. v. Floyd, 70 Ark. 418, 68 S. W. 484; S. v. Harris, 107 La. Ann. 325, 31 So. 782; Aden v. Road Dist. &c. 197 Ill. 220, 64 N. E. 274; Shepherd v. S. 36 Fla. 374, 18 So. 773; Hubbard v. S. 37 Fla. 156, 20 So. 235; Bush v. S. 47 Neb. 642, 66 N. W. 638; Crump v. Com. (Va.), 23 S. E. 760.

[9] Strickfadden v. Zipprick, 49 Ill. 288.

[10] Pitman v. Mauran, 69 N. H. 230, 40 Atl. 392; Yates v. U. S. 90 Fed. 57; Commercial Travelers' M. A. Asso. v. Fulton, 79 Fed. 423; McKown v. Powers, 86 Me. 291, 29 Atl. 1079; Hindman v. First Nat. Bank, 112 Fed. 931; Murray v. S. 26 Ind. 141; S. v. Westlake, 159 Mo. 669; Buel v. New York Steamer, 17 La. Ann. 541; Reynolds v. S. 68 Ala. 507; Schroeder v. Rinhard, 25 Neb. 75, 40 N. W. 593; S. v. Clark, 37 Vt. 471; Little Miami R. Co. 22 Ohio St. 324; Garton v. Union City Nat. Bank, 34 Mich. 279; Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35, 413; O'Conner v. Chicago M. & St. P. R. Co. 27 Minn. 166, 6 N. W. 481; Gibson v. S. 26 Fla. 109, 7 So. 376.

[11] Polykrans v. Kransz, 77 N. Y. S. 46, 73 App. Div. 583; Gehl v. Milwaukee Pro. Co. 116 Wis. 263, 93 N. W. 26; S. v. Pirlot, 19 R. I. 695; Vaughn v. Ferrall, 57 Ind. 182; Hawley v. S. 69 Ind. 98, 38 Atl. 656. If the court while charging the jury should misstate the evidence, counsel should at once call the court's attention to the mistake that it may be corrected before the jury retires, although specific exceptions may not be required, Jameson v. Weld, 93 Me. 345, 45 Atl. 299; Wood v. Wells, 103 Mich. 320, 61 N. W. 503. See Henry v. Henry, 122 Mich. 6, 80 N. W. 800.

[12] McDonald v. U. S. 63 Fed. 426; S. v. O'Donald (Idaho), 39 Pac. 556; S. v. Hart, 116 N. Car. 976, 20 S. E. 1014; P. v. Thiede, 11 Utah, 241, 39 Pac. 837; Vaughn v. Ferrall, 57 Ind. 182; Jaqua v. Cordesman, 106 Ind. 141, 5 N. E. 907 (too late on motion for new trial); Murray v. S. 26 Ind. 141 (must be taken before jury retire); Garoutte v. Williamson, 108 Cal. 135, 41 Pac. 35; Le Bean v. Telephone & T. C. Co. 109 Mich. 302, 67 N. W. 339; S. v.

instructions for the first time on a motion for a new trial unless permitted by statute.[13] By statutory provision of Iowa exceptions may be taken to the giving or refusing of instructions on a motion for a new trial.[14]

§ 348. Specific exceptions generally necessary.—According to the practice in some of the states the exceptions should specifically point out the errors complained of as to each of the instructions.[15] The mere exception to the giving of an instruction is not sufficient; the attention of the court should be called to the particular point of objection, and a request made to correct the imperfection.[16] And the exception should be made to each in-

Hart, 116 N. Car. 976, 20 S. E. 1014; Bynum v. Southern Pump Co. 63 Ala. 462; Thiede v. Utah, 159 U. S. 510, 16 Sup. Ct. 62; Barker v. Todd, 37 Minn. 370, 34 N. W. 895; Collins v. George (Va.), 46 S. E. 684.

[13] Tobias v. Triest, 103 Ala. 664, 15 So. 914; S. v. Vickers, 47 La. Ann. 1574, 18 So. 639; Boon v. Murphy, 108 N. Car. 187, 12 S. E. 1032; Lary v. Young (Tex. Cv. App.), 27 S. W. 908; Illinois Cent. R. Co. v. Modglin, 85 Ill. 481; Harrison v. Chappell, 84 N. Car. 258; Louisville, N. A. & C. R. Co. v. Hart, 119 Ind. 273, 21 N. E. 753; Boss v. Northern P. R. Co. 2 N. Dak. 128, 49 N. W. 655; Snyder v. Nelson, 31 Iowa, 238; S. v. Meyers, 99 Mo. 107, 12 S. W. 516; Shepherd v. S. 36 Fla. 374, 18 So. 773; S. v. Halford, 104 N. Car. 874, 10 S. E. 524. But see Collins Ice Cream Co. v. Stephens, 189 Ill. 200, 59 N. E. 524.

[14] Shoemaker v. Turner, 117 Iowa, 340, 90 N. W. 709. The same rule governs as to the modification of requested instructions. Exception must be taken to the refusal to give the instruction as requested, and also the action of the court in giving it as modified. Brozek v. Steinway R. Co. 161 N. Y. 63, 55 N. E. 395; Muller v. Powers, 174 Mass. 555, 55 N. E. 395; Elkhorn Valley Lodge v. Hudson, 58 Neb. 672, 81 N. W. 859; Lewis v. Topman, 90 Md. 274, 45 Atl. 450; Davis v. Bailey, 21 Ky. L. R. 839, 53 S. W. 31; Missouri P. R. Co. v. Williams, 75 Tex. 4, 12 S. W. 835; Metropolitan St. R. Co. v. Hudson, 113 Fed. 449; Helms v. Wayne A. Co. 73 Ind. 332. See Patterson v. Indianapolis & B. R. R. Co. 56 Ind. 20; Burns v. P. 126 Ill. 285, 18 N. E. 550; Ballance v. Leonard, 37 Ill. 43; St. Louis, I. M. & S. R. Co. v. Hecht, 38 Ark. 357.

[15] Walters v. Laurens Cotton Mills, 53 S. Car. 155, 31 S. E. 1; Henderson v. Bartlett, 53 N. Y. S. 149, 32 App. Div. 435; Owen v. Brown, 70 Vt. 521, 41 Atl. 1025; Thomas v. Union R. Co. 45 N. Y. S. 920, 18 App. Div. 185; Lichty v. Tarmatt, 11 Wash. 37, 39 Pac. 260; Hedrick v. Straus, 42 Neb. 485, 60 N. W. 928; Emery v. Boston & M. R. 67 N. H. 434, 36 Atl. 367; Hampton v. Norfolk & W. R. Co. 120 N. Car. 534, 27 S. E. 96, 35 L. R. A. 808; Fitzpatrick v. Union Tr. Co. (Pa.), 55 Atl. 1050; S. v. Webster, 107 La. 45, 31 So. 383; Gallman v. Union H. Mfg. Co. 65 S. Car. 192, 43 S. E. 524; Ohio & M. R. Co. v. McCartney, 121 Ind. 385, 23 N. E. 258; Kendrick v. Dillinger, 117 N. Car. 491, 23 S. E. 438; S. v. Tibbs, 48 La. Ann. 1278, 20 So. 735. Contra: Farmers' S. B. v. Wilka (Iowa), 17 N. W. 210; Williams v. Com. 80 Ky. 315; Williams v. Barrett, 52 Iowa, 638, 3 N. W. 690; Van Pelt v. City of Davenport, 42 Iowa, 314; Woods v. Berry, 7 Mont. 201, 14 Pac. 758.

[16] Thomas v. Union R. Co. 45 N. Y. S. 920, 18 App. Div. 185; Bailey v. Mill Creek Coal Co. 20 Pa. Super. Ct. 186; Jacksonville & St. L. R. Co. v. Wilhite, 209 Ill. 84, 87.

struction severally and distinctly;[17] and it should disclose to what particular legal proposition it applies before it will be considered on review.[18] An exception which fails to state either the words or the substance of an instruction of which complaint is made is too indefinite.[19] If an instruction is vague, indefinite and calculated to leave the jury in doubt, the court's attention should be called to the imperfection at the time, to be of any avail on appeal or writ of error.[20] An exception that the charge "does not properly state the measure of plaintiff's damages or recovery under the allegations of the complaint," is too indefinite.[21] An exception "to that part of the charge stating the effect of good character" taken to a certain portion of the charge to the jury which treats only of the proper effect of evidence of good character is sufficiently specific under the practice in the federal courts.[22]

§ 349. General exceptions sufficient.—In other states a general exception is sufficient. Thus, in Kentucky the law makes no distinction between a general and particular or specific exception, as either is sufficient to authorize the reviewing court to consider and examine alleged errors in the giving or refusing of instructions.[23] Under the code of Iowa, where the exceptions are taken to instructions at the time they are given, the ground of exception need not be stated;[24] but exceptions taken after the verdict must specifically point out the ground of objection as to each instruction.[25] In Indiana by statute an entry in general terms that the party excepts to the giving or refusing of a designated instruction is sufficient.[25*]

In Maryland it has been held that where several instructions are presented at the same time, forming a series of consecutive

[17] Newport News & M. V. Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743; American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068.

[18] Field v. Long, 89 Me. 454, 36 Atl. 984; Faivre v. Manderschild, 117 Iowa, 724, 90 N. W. 76.

[19] Atkins v. Field, 89 Me. 281, 36 Atl. 375.

[20] Fowler v. Harrison, 64 S. Car. 311, 42 S. E. 159; City of South Omaha v. Meyers (Neb.), 92 N. W. 743.

[21] McDonough v. Great N. R. Co. 15 Wash. 244, 46 Pac. 334.

[22] Edington v. U. S. 164 U. S. 361, 17 Sup. Ct. 72; Brown v. U. S. 164 U. S. 221, 17 Sup. Ct. 33.

[23] Williams v. Com. 80 Ky. 315.

[24] Williams v. Barrett, 52 Iowa, 638, 3 N. W. 690; Van Pelt v. City of Davenport, 42 Iowa, 314.

[25] Byford v. Girton, 90 Iowa, 661, 57 N. W. 588; Benson v. Lundy, 52 Iowa, 265, 3 N. W. 149.

[25*] Childress v. Callender, 108 Ind. 394, 9 N. E. 292; Acts Ind. 1903, p. 338; See post, § 357.

legal propositions, it is but a single act, and the whole will be embraced in one exception.[26] The taking of an exception "to the refusal of the court to charge specifically as requested" is an exception to the refusal of each instruction requested under the practice in New Jersey.[27] In one jurisdiction it has been held that where a party requests the court to give an instruction and it is refused, an exception need not be taken to one given by the court which is inconsistent with the one requested.[28] Where exception is taken to any matter in the record it is not necessary to take other exceptions if the exception first taken covers the matter in issue.[29]

§ 350. Exceptions when instructions are numbered.—Where the instructions are numbered and separately given, an exception at the conclusion "to the giving of each and every and all of said instructions separately," is sufficient under the practice in some of the states.[29] So, also, the taking of an exception "to the giving of instructions three, four, five and six, contained in the general charge of the court, and to the giving of each of said instructions," is sufficient, being separate and specific as to each instruction.[30] Or an exception to the giving or refusing of instructions numbered from "one to nine inclusive and to each of them" is sufficient.[31] But an exception that the court erred in giving instructions "three and four" is not sufficient if one of them properly states the law.[32]

[26] McCosker v. Banks, 84 Md. 292, 25 Atl. 935.

[27] Consolidated Tr. Co. v. Chenowith, 61 N. J. L. 554, 35 Atl. 1067.

[28] Evans v. Clark, 1 Indian Ter. 216, 40 S. W. 771.

[29] Ellis v. Leonard, 107 Iowa, 487, 78 N. W. 246; McClellan v. Hein, 56 Neb. 600, 77 N. W. 120; Geary v. Parker, 65 Ark. 521, 47 S. W. 238; Rhea v. U. S. 6 Okla. 249, 50 Pac. 992; Ritchey v. P. 23 Colo. 314, 47 Pac. 272, 384; Ludgwig v. Blackshere (Iowa), 77 N. W. 356; Terre Haute & I. R. Co. v. McCorkle, 140 Ind. 613, 40 N. E. 62; Bower v. Bower, 146 Ind. 393, 45 N. E. 595. See Dunham v. Holloway, 3 Okla. 244, 41 Pac. 140.

[30] Brooks v. Dutcher, 22 Neb. 644, 36 N. W. 128; City of Omaha v. Richards, 49 Neb. 249, 68 N. W. 528.

[31] Rice v. Williams (Colo. App.), 71 Pac. 433; Denver & R. G. R. Co. v. Young, 30 Colo. 349, 70 Pac. 688; Witsell v. West Asheville R. Co. 120 N. Car. 557, 27 S. E. 125.

[32] Cincinnati, H. & I. R. Co. v. Cregor, 150 Ind. 625, 50 N. E. 760; Aitkens v. Rawlings, 52 Neb. 539, 72 N. W. 858; Kloke v. Martin, 55 Neb. 554, 76 N. W. 168; Hall v. Needles, 1 Indian Ter. 146, 38 S. W. 671; Voelckel v. Banner Brew. Co. 9 Ohio C. C. 318; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491; Jones v. Ellis, 68 Vt. 544, 35 Atl. 488. See Whipple v. Preece, 24 Utah, 364, 67 Pac. 1071, holding not sufficient to refer to the instruction by number only; the particular point of objection must be indicated.

§ 351. Exceptions—General, specific and joint.—A general exception to the entire charge, consisting of detached propositions of law, some of which are correct and some erroneous, will be of no avail in a court of review. The erroneous instructions must be specifically pointed out.[33] Thus, an exception to the charge "as given," without pointing out in what particular the charge is erroneous, is too general.[34] Also an exception "to the giving of each and every one" of the instructions is too general.[35]

[33] Postal T. C. Co. v. Hulsey, 115 Ala. 193, 22 So. 854; S. v. Webster, 121 N. Car. 586, 28 S. E. 254; Hampton v. Ray, 52 S. Car. 74, 29 S. E. 537; Ruby C. M. & M. Co. v. Prentice, 25 Colo. 4, 52 Pac. 210; Pearson v. Spartenberg Co. 51 S. Car. 480, 29 S. E. 193; Powers v. Hazelton & L. R. Co. 33 Ohio St. 438; Standard L. & A. Ins. Co. v. Davis, 59 Kas. 521, 53 Pac. 856; Shaffer v. Cincinnati, H. & D. R. Co. 14 Ohio C. C. 488; Haas v. Brown, 47 N. Y. S. 606, 21 Misc. 434; Hart v. Bowen, 86 Fed. 877; Gilroy v. Loftus, 48 N. Y. S. 532, 22 Misc. 105; Bennett v. McDonald, 52 Neb. 278, 72 N. W. 268; Drenning v. Wesley, 189 Pa. St. 160, 44 Atl. 13; Craig v. Borough, 11 Pa. Super. Ct 490; Gregg v. Willis, 71 Vt. 313, 45 Atl. 229; Phoenix A. Co. v. Lucker, 77 Fed. 243; Newman v. Virginia T. & C. S. & I. Co. 80 Fed. 228; City of So. Omaha v. Powell, 50 Neb. 798, 70 N. W. 391; Adams v. S. 25 Ohio St. 584; Rosenfield v. Rosenthal (Tex. Cv. App.), 39 S. W. 193; Pickham v. Wheeter B. Mfg. Co. 77 Fed. 663; Wills v. Hardcastle, 19 Pa. Super. Ct. 525; Thompson v. Security T. & L. Ins. Co. 63 S. Car. 290, 41 S. E. 464; Harris v. Smith, 71 N. H. 330, 52 Atl. 854; Gutzman v. Clancy, 114 Wis. 589, 90 N. W. 1081; Lee v. Hammond, 114 Wis. 550, 90 N. W. 1073; Jones v. S. 160 Ind. 539, 67 N. E. 264; Rastetter v. Reynolds, 160 Ind. 141, 66 N. E. 612.

[34] S. v. Moore, 120 N. Car. 570, 26 S. E. 697; Winbish v. Hamilton, 47 La. Ann. 246, 16 So. 856; Antietam Paper Co. v. Chronicle Pub. Co. 15 N. Car. 147, 20 So. 367; Barrett v. S. (Tex. Cr. App.), 69 S. W. 144; Finance Co. v. Old Pittsburg C. Co. 65 Minn. 442, 68 N. W. 70; P. v. Thiede, 11 Utah, 241, 39 Pac. 839; S. v. Varner, 115 N. Car. 744, 20 S. E. 518; Jones v. S. 160 Ind. 539, 67 N. E. 264; Magoon v. Before, 73 Vt. 231, 50 Atl. 1070; St. Louis, I. M. & S. R. Co. v. Norton (Ark.), 73 S. W. 1095; Hamilton v. Great F. St. R. Co. 17 Mont. 334, 42 Pac. 860; S. v. Varner, 115 N. Car. 744, 20 S. E. 518; P. Ft. W. & C. R. Co. v. Probst, 30 Ohio St. 106; Western Ins. Co. v. Tobin, 32 Ohio St. 88.

[35] Crawford v. Athletic Asso. 111 Iowa, 736, 82 N. W. 944; Columbus C. Co. v. Crane Co. 101 Fed. 55, 98 Fed. 946; Allend v. Spokane Falls & N. R. Co. 21 Wash. 324, 58 Pac. 244; New Orleans & N. E. R. Co. v. Clements, 100 Fed. 415; Cook v. Kilgo, 111 Ga. 817, 35 S. E. 673; La Manna v. Munroe, 62 N. Y. S. 984; Appeal of Turner, 72 Conn. 305, 44 Atl. 310; Cavallora v. Texas & P. R. Co. 110 Cal. 348, 42 Pac. 918 (instructions given on court's own motion); Holloway v. Dunham, 170 U. S. 615, 18 Sup. Ct. 784; Consolidation C. & M. Co. v. Clay, 51 Ohio St. 542, 38 N. E. 610; Ryan v. Washington & G. R. Co. 8 App. Cas. (D. C.) 542; Carpenter v. Eastern R. Co. 67 Minn. 188, 69 N. W. 720; Willoughby v. Northeastern R. Co. 52 S. Car. 166, 29 S. E. 629; Pittsburg & W. R. Co. v. Thompson, 82 Fed. 720; Spears v. U. S. 81 Fed. 694, 26 C. C. A. 570; Harless v. U. S. 1 Indian Ter. 447, 45 S. W. 133; Ludwig v. Blackshere, 102 Iowa, 366, 71 N W. 356; Rheimfeldt v. Dahlman,

An exception taken thus: "To which said charge and the whole thereof the defendant then and there duly excepted," is not sufficiently specific upon which to assign error.[36]

An assignment of error that the instructions "improperly state the law, are confusing, conflicting, misleading and present false issues," is too general.[37] So, an exception taken "to the portions of the charge wherein it is stated that certain parts of the publication are libelous per se," is too broad.[38] The taking of an exception "severally and separately to each and every section and each and every paragraph of the charge" is not sufficient unless the entire charge is erroneous.[39] So, also, an exception to a number of instructions as an entirety is of no avail unless they are all erroneous.[40] But where the error complained of affects the entire charge, then such general exception is suffi-

43 N. Y. S. 28, 19 Misc. 162; Miller v. P. 23 Colo. 95, 46 Pac. 111; Jones v. East Tenn. V. & G. R. Co. 157 U. S. 682, 15 Sup. Ct. 719; Luedtke v. Jeffrey, 89 Wis. 136, 61 N. W. 292; Goodman v. Sampliner, 23 Ind. App. 72, 54 N. E. 823; World M. B. Asso. v. Worthing, 59 Neb. 587, 81 N. W. 620; Waples P. Co. v. Turner, 82 Fed. 64; Globe Oil Co. v. Powell, 56 Neb. 463, 76 N. W. 1081; McAlister v. Long, 33 Ore. 368, 54 Pac. 124; Andrews v. Postal Tel. Co. 119 N. Car. 403, 25 S. E. 955; Barker v. Cunard S. S. Co. 157 U. S. 693, 51 N. E. 1089; S. v. Melton, 120 N. Car. 591, 26 S. E. 933; Burnett v. Wilmington, N. & N. R. Co. 120 N. Car. 517, 26 S. E. 819. See Williams v. Casebeer, 126 Cal. 86, 58 Pac. 380.

[36] Love v. Anchor Raisin Vin. Co. (Cal.), 45 Pac. 1044; Gable v. Rauch, 50 S. Car. 95, 27 S. E. 555; Hayes v. S. 112 Wis. 304, 87 N. W. 1076; Bernstein v. Downs, 112 Cal. 197, 44 Pac. 557.

[37] Shoemaker v. Bryant Lumber & S. M. Co. 27 Wash. 637, 68 Pac. 380. See Butler v. Holmes (Tex. Cv. App.), 68 S. W. 52.

[38] Cunningham v. Underwood, 116 Fed. 803.

[39] Syndicate Ins. Co. v. Cutchings, 104 Ala. 176, 16 So. 46; Leach v. Hill, 97 Iowa, 81, 66 N. W. 69; Jones v. Ellis Estate, 68 Vt. 544, 35 Atl. 488; Ragsdale v. S. 134 Ala. 24, 32 So. 674; Merrill v. Palmer, 68 Vt. 475, 33 Atl. 829; Thiede v. P. 159 U. S. 510, 16 Sup. Ct. 62. See, also, Pease Piano Co. v. Cameron, 56 Neb. 561, 76 N. W. 1053; Thom v. Pittard, 62 Fed. 232; Green v. Hansen, 89 Wis. 597, 62 N. W. 408; Dunnington v. Frick Co. 60 Ark. 250, 30 S. W. 212; Vider v. O'Brien, 62 Fed. 326; Carpenter v. American A. Co. 46 S. Car. 541, 24 S. E. 500; Scoville v. Salt Lake City, 11 Utah, 60, 39 Pac. 481; Omaha Fire Ins. Co. v. Deirks, 43 Neb. 473, 61 N. W. 740; Postal Tel. C. Co. v. Hulsey, 132 Ala. 444, 31 So. 527; Hallenbeck v. Garst, 96 Iowa, 509, 65 N. W. 417; Schollay v. Moffitt W. Drug Co. (Colo. App.), 67 Pac. 182.

[40] S. v. Ray, 146 Ind. 500, 45 N. E. 693; Home Fire Ins. Co. v. Phelps, 51 Neb. 623, 71 N. W. 303; Lane v. Minnesota S. Agr. Soc. 67 Minn. 65; 69 N. W. 463; Culter v. Skeels, 69 Vt. 154, 37 Atl. 228; Rastetter v. S. 160 Ind. 133, 66 N. E. 612; Milliken v. Maund, 110 Ala. 332, 20 So. 310; Union P. R. Co. v. Callaghan, 161 U. S. 91, 16 Sup. Ct. 493; McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; Barker v. Cunard S. S. Co. 36 N. Y. S. 256, 91 Hun (N. Y.), 495; Dickerson v.

cient.[41] Or where the whole charge or the portion to which exception is taken amounts merely to a single proposition a general exception is sufficient.[42]

The taking of an exception to the instructions on the ground that the charge is too general is of no avail on review in the absence of a request for more specific instructions.[43] So, an exception taken to instructions by two parties jointly is of no avail if they are erroneous as to one only.[44] The rules deduced from the authorities cited are to the effect that if exceptions are taken jointly by two or more parties, they are unavailing unless the instructions are erroneous as to all who join; and if the exceptions are in gross to a series of instructions, they will likewise be unavailing if any one of the instructions is correct.

§ 352. **Failure to except—Effect.**—The general rule is that exceptions to instructions given, or the refusal to give, must be taken in the trial court; objections to instructions cannot be made for the first time on appeal.[45] But according to statutory provisions, or the practice, in some states, errors may be assigned on appeal or writ of error as to the giving or refusing of instructions, although no exceptions whatever were taken in the trial court.[47] This rule governs in criminal as well as civil causes; espe-

Quincy M. F. Ins. Co. 67 Vt. 609, 32 Atl. 489; Lowe v. Salt Lake City, 13 Utah, 91, 44 Pac. 1050; Bonner v. S. 107 Ala. 97, 18 So. 226; Hodge v. Chicago & A. R. Co. 121 Fed. 52; Coal & Mining Co. v. Clay, 51 Ohio St. 550, 38 N. E. 610; Western Ins. Co. v. Tobin, 32 Ohio St. 88; Glaser v. Glaser (Okla.), 74 Pac. 945.

[41] Hindman v. First Nat. Bank, 112 Fed. 931, 57 L. R. A. 108.

[42] Nickum v. Gaston, 24 Ore. 380, 33 Pac. 671, 35 Pac. 31; Haun v. Rio Grande W. R. Co. 22 Utah, 346, 62 Pac. 908; Boyce v. Wabash R. Co. 63 Iowa, 70, 18 N. W. 673.

[43] Queen Ins. Co. v. Leonard, 9 Ohio C. C. 46; Burnham v. Logan, 88 Tex. 1, 29 S. W. 1067; Producers' Marble Co. v. Bergen (Tex. Cv. App.), 31 S. W. 89. See, also, Lindheim v. Duys, 31 N. Y. S. 870, 11 Misc. 16; Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 49; Crossette v. Jordan (Mich.), 92 N. W. 782; Copeland v. Ferris, 118 Iowa, 554, 92 N. W. 699.

[44] Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253.

[45] S. v. Probasco, 46 Kas. 310, 26 Pac. 749; Kansas Farmers' etc. Ins. Co. v. Hawley, 46 Kas. 746, 27 Pac. 176; Ritzenger v. Hart, 43 Mo. App. 183; Fleming v. Fleming, 33 S. Car. 505; 12 S. E. 257; Price v. Vanstone, 40 Mo. App. 207; Connelly v. Shamrock Ben. Soc. 43 Mo. App. 283; East St. Louis Elec. R. Co. v. Stout, 150 Ill. 9, 36 N. E. 963; West Chicago St. R. Co. v. Martin, 154 Ill. 523, 39 N. E. 140; McKinnon v. Atkins, 60 Mich. 418, 27 N. W. 564; P. v. Buddensieck, 103 N. Y. 487, 9 N. E. 44; Coffee v. McCord, 83 Ind. 593.

[47] National Bank v. Sumner, 119 N. Car. 591, 26 S. E. 129; Grugan v. City of Philadelphia, 158 Pa. St 337, 27 Atl. 1000; Janny v. Howard, 150 Pa. St. 342, 24 Atl. 740;

cially in capital cases, in a few states, will errors as to instructions be considered on review, although in the trial court no exceptions were taken as is generally required.[48]

§ 353. Assignment of error on instructions in group.—The assignment of error in a group or en masse as to the giving or refusing of instructions, will not be considered on appeal or writ of error if any one of the group of instructions was properly given or refused, as the case may be.[49] Where error is assigned in the giving and refusing of a group of instructions, and one of them is proper, the whole assignment of error fails. Assigning error in this manner without pointing out the reasons to enable the court to determine the questions involved will not be considered on appeal.[50] So, where a party prepares a series of instructions and requests the court to give them as a whole, and excepts to the refusal to give the request as a whole, the assignment of error in refusing to give a portion will not be considered by the reviewing court.[51] In Nebraska the assignment of error must be separate on each instruction complained of on the motion for a new trial, as well as in the petition in error.[52]

§ 354. Exceptions limited to grounds stated.—Instructions will be reviewed only as to the particular grounds for which error

Whitaker v. S. 106 Ala. 30, 17 So. 456; Hill v. S. 35 Tex. Cr. App. 371, 33 S. W. 1075; McMillan v. S. 35 Tex. Cr. App. 370, 33 S. W. 970 (misdemeanors require exception by statute).

[48] Falk v. P. 42 Ill. 335; P. v. Barberi, 149 N. Y. 256, 43 N. E. 635; Hill v. S. 35 Tex. Cr. App. 371, 33 S. W. 1075.

[49] Lewis v. S. 42 Fla. 253, 28 So. 397; Frenzer v. Richards, 60 Neb. 131, 82 N. W. 317; Brozek v. Steinway R. Co. 161 N. Y. 63, 55 N. E. 395; New Dunderberg Min. Co. v. Old, 97 Fed. 150; Lineham R. Tr. Co. v. Morris, 87 Fed. 127; Illinois Cent. & E. Co. v. Linstroth Wagon Co. 112 Fed. 737; New Eng. T. & C. Co. v. Catholican, 79 Fed. 294; Dempster M. Mfg. Co. v. First Nat. Bank, 49 Neb. 321, 68 N. W. 477; Behrends v. Beyschlag, 50 Neb. 304; 69 N. W. 835; Stough v. Ogden, 49 Neb. 291, 68 N. W. 516; Axthelm v. Chicago R. I. & P. R. Co. (Neb.), 89 N. W. 313; Green v. Tierney, 62 Neb. 561, 87 N. W. 331; Runquist v. Anderson, 64 Neb. 755, 90 N. W. 760; Redman v. Voss, 46 Neb. 512, 64 N. W. 1094; P. v. Berlin, 10 Utah, 39, 36 Pac. 190; Rowen v. Sommers (Iowa), 66 N. W. 897.

[50] Albion Milling Co. v. First Nat. Bank, 64 Neb. 116, 89 N. W. 638. See King v. S. 43 Fla. 211, 31 So. 254.

[51] Murry v. Board of Comrs. 58 Kas. 1, 48 Pac. 554.

[52] Karnes v. Dovey, 53 Neb. 725, 74 N. W. 311; Langshort v. Coon, 53 Neb. 765, 74 N. W. 257; Kloke v. Martin, 55 Neb. 554, 76 N. W. 168.

is assigned.[53] The filing of exceptions with the clerk of the court, as provided by statute, to the ruling of the court in the giving or refusing of instructions, limits the party to the exceptions thus filed.[54]

§ 355. Objections and exceptions not waived.—The fact that instructions are not requested at all by a party on a particular point or issue will not bar him from assigning error and urging objections to erroneous instructions given for his opponent on the same subject.[55] The giving of erroneous instructions which are prejudicial to the rights of a litigant is ground for the assignment of error, although no instructions were requested by the complaining party.[56] So, if it appears that the jury took the wrong view of the law, error may be assigned, whether the complaining party requested instructions or not.[57]

An instruction assuming to cover an entire question, such, for instance, as the question of liability, but which omits a material element, is erroneous; and in such case the other party is not precluded from assigning error thereon, though he did not request an instruction on the same subject.[58] And in some jurisdictions, although an instruction is defective and for that reason properly refused, yet if it is sufficient to call the attention of the court to the question upon which it is requested to be given, the failure of the court to give a proper instruction on that particular matter is error.[59]

[53] Mixon v. Mills, 92 Tex. 318, 47 S. W. 966; Edmunds v. Black, 15 Wash. 73; 45 Pac. 639. See, also, Cole v. Curtis, 16 Minn. 182; Ryall v. Central Pac. R. Co. 76 Cal. 474, 18 Pac. 430; Phipps v. Pierce, 94 N. Car. 514; Price v. Burlington C. R. & N. R. Co. 42 Iowa, 16.

[54] S. v. Campbell, 7 N. Dak. 58, 77 N. W. 935.

[55] Ford v. Chicago & R. I. & P. Co. 106 Iowa, 85, 75 N. W. 650; Wills v. Tanner, 19 Ky. L. R. 795, 39 S. W. 422; International & G. N. R. Co. v. Kuehn, 11 Tex. Cv. App. 21, 31 S. W. 322; Johnson v. Johnson (Tex. Cv. App.), 67 S. W. 123.

[56] Seffel v. Western U. Tel. Co. (Tex. Cv. App.), 67 S. W. 897; International G. & N. R. Co. v. Welch, 86 Tex. 203, 24 S. W. 395; Missouri, K. & T. R. Co. v. Kirschoffer (Tex. Cv. App.), 24 S. W. 577; Pierson v. Duncan, 162 Pa. St. 239, 29 Atl. 733; Whelchel v. Gainesville & D. E. R. Co. 116 Ga. 431, 42 S. E. 776; Gowdey v. Robbins, 38 N. Y. S. 280, 3 App. Div. 353; Carter v. Columbia & G. R. Co. 19 S. Car. 26; Bynum v. Bynum, 33 N. Car. 632; S. v. Pennell, 56 Iowa, 29, 8 N. W. 686.

[57] York Park Bldg. Asso. v. Barns, 39 Neb. 834, 58 N. W. 440.

[58] City of South Omaha v. Hager (Neb.), 92 N. W. 1017.

[59] Cleveland v. Empire Mills Co. 6 Tex. Cv. App. 479, 25 S. W. 1055; Carpenter v. Dowe (Tex. Cv. App.), 26 S. W. 1002; Kinyon v. Chicago & N. W. R. Co. 118 Iowa, 349, 92 N. W. 40; Gulf, C. & S. F. R. Co.

§ 356. Errors presented on motion for new trial.—It must appear that any errors complained of in giving instructions were called to the attention of the court on a motion for a new trial, that the court may have an opportunity to correct the errors before they will be considered by a court of review.[60] And the errors complained of should be specifically pointed out in the motion for a new trial.[61] In some of the states the practice requires that the errors must be separately assigned as to each instruction complained of, in the motion for a new trial.[62] But in Illinois a court of review on appeal or writ of error will pass upon the correctness in giving instructions, although no motion for a new trial appears in the bill of exceptions.[63]

§ 357. Making instructions part of the record.—In some of the states the instructions are made a part of the record by statute, thus dispensing with the necessity of embodying them in a bill of exceptions.[64] By statute in Indiana, when requested in writing by either party, the judge must reduce all instructions to writing and number and sign them. Exceptions may be taken by writing on the margin or at the end of each instruction "given and excepted to," or "refused and excepted to;" this memorandum must be dated and signed by the judge. But instructions thus excepted to must be filed and the record must affirmatively show that fact before they will be regarded as a part of the record.[65]

v. Manghan, 29 Tex. Cv. App. 486, 69 S. W. 80; Neville v. Mitchell (Tex. Cv. App.), 66 S. W. 579; City of Sherman v. Greening (Tex. Cv. App.), 73 S. W. 424; Leeds v. Reed (Tex. Cv. App.), 36 S. W. 347.

[60] Brown v. Mayo, 80 Mo. App. 81; Izlar v. Manchester & A. R. Co. 57 S. Car. 332, 35 S. E. 583; Hintz v. Graupner, 138 Ill. 158, 165, 27 N. E. 935; Schmidt & Bro. Co. v. Mahoney, 60 Neb. 20, 82 N. W. 99; First Nat. Bank v. Tolerton (Neb.), 97 N. W. 248; Davis v. Hall (Neb.), 97 N. W. 1023; Evening Post Co. v. Canfield, 23 Ky. L. R. 2028, 68 S. W. 502; Jones v. Layman, 123 Ind. 573, 24 N. E. 363; Grant v. Westfall, 57 Ind. 121. See Irwin v. Smith, 72 Ind. 488. See Dawson v. Coffman, 28 Ind. 220; Douglass v. Blankenship, 50 Ind. 160; Schenck v. Butsch, 32 Ind. 344.

[61] Central of Georgia R. Co. v. Bond, 111 Ga. 13, 36 S. E. 299; Newman v. Day, 108 Ga. 813, 34 S. E. 167.

[62] Palmer v. First Bank of Ulyses (Neb.), 81 N. W. 303; Stons & Harrison v. Fesselman, 23 Ind. App. 293, 55 N. E. 245.

[63] Illinois Cent. R. Co. v. O'Keefe, 154 Ill. 508, 514, 39 N. E. 606. See North C. St. R. Co. v. Wrixon, 150 Ill. 532, 37 N. E. 895.

[64] Utah Optical Co. v. Keith, 18 Utah, 477, 56 Pac. 155; S. v. Bartly, 56 Neb. 810, 77 N. W. 438; Clanin v. Fagan, 124 Ind. 304, 24 N. E. 1044; Blumer v. Bennett, 44 Neb. 873, 63 N. W. 14.

[65] Dix v. Akers, 30 Ind. 433; Wallace v. Goff, 71 Ind. 294; Louis-

The instructions may be brought into the record by bill of exceptions, but there must be some showing that the instructions given or refused were properly excepted to.[66] It has recently been held in this state, apparently in the teeth of the statute, that the marginal exceptions provided by statute are not sufficient to raise any question on appeal, unless it is otherwise shown which party took the exceptions.[67] But in criminal cases instructions can only be made a part of the record by a bill of exceptions.[68] There are four methods in Indiana by which instructions may be brought into record: (1) By marginal exceptions; (2) By order of court; (3) By bill of exceptions; (4) By general exceptions under the recent statute. But the only safe way is by a general bill of exceptions, as the record must affirmatively show that the instructions set out in the record were all the instructions given. Copying the instructions in the motion for a new trial does not make them a part of the record, and in such form will not be considered on review.[69]

§ 358. By bill of exceptions.—Errors assigned in the giving or refusing of instructions will not be considered by a court of review unless the instructions given and refused are properly preserved in a bill of exceptions or other proper mode, showing that exceptions were properly taken in the trial court.[70] Accord-

ville, N. A. and C. R. Co. v. Wright, 115 Ind. 378, 16 N. E. 145, 17 N. E. 584; Riley v. Allen, 154 Ind. 176, 56 N. E. 240.

[66] Eslinger v. East, 100 Ind. 434.

[67] Indiana, &c. R. Co. v. Bundy, 152 Ind. 590, 53 N. E. 175.

[68] Leverich v. S. 105 Ind. 277, 4 N. E. 852; Delhaney v. 115 Ind. 499, 18 N. E. 49; Utterback v. S. 153 Ind. 545, 55 N. E. 420.

By recent statute in Indiana instructions may be excepted to by numbers, either in writing or orally, and such exceptions noted on the court's minutes and the instructions filed, and they, with the exceptions, become a part of the record. Acts of 1903, p. 338.

[69] Archibald v. S. 122 Ind. 122, 23 N. E. 758; Claflin v. Cottman, 77 Ind. 58; Lake E. & W. R. Co. v. Holland, 162 Ind. 406, 69 N. E. 142.

[70] Burnette v. Town of Guyers, 106 Wis. 618, 82 N. W. 564; Plano Mfg. Co. v. McCord (Iowa), 80 N. W. 659; Barker v. Lawrence Mfg. Co. 176 Mass. 203, 57 N. E. 366; Ryder v. Jacobs, 196 Pa. St. 386, 46 Atl. 667; Commissioners v. Ryckman, 91 Md. 36, 46 Atl. 317; Westberg v. Simmons, 57 S. Car. 467, 35 S. E. 764; Bowen v. Southern R. Co. 58 S. Car. 222, 36 S. E. 590; Hogan v. Peterson, 8 Wyo. 549; 59 Pac. 162; Gulliver v. Adams Ex. Co. 38 Ill. 509; Dombrook v. Rumely Co. (Wis.), 97 N. W. 493; Berkett v. Bond, 12 Ill. 86; Buckmaster v. Cool, 12 Ill. 74; Lindsay v. Turner, 156 U. S. 208, 15 Sup. Ct. 355; Leifheit v. Jos. Schlitz Brewing Co. 106 Iowa, 451, 76 N. W. 730; Farmers' Loan & T. Co. v. Siefke, 144 N. Y. 354, 39 N. E. 358; Burnett v. Cavanaugh, 56 Neb. 190; 76 N. W. 576; Evans v. Clark (Miss.), 24 So. 532; Abbott v. City

ing to the practice in Indiana, if a motion for a new trial is passed upon at a term subsequent to the return of the verdict, the court may then grant time within which to file a bill of exceptions embracing the evidence and the rulings upon the motion; but such bill will not preserve any ruling made during the trial, nor will such bill bring the instructions into the record.[71]

§ 359. All instructions must be in record.—A court of review will not consider the assignment of errors as to instructions unless the entire charge or all of the instructions given and refused are made part of the record by a bill of exceptions or other proper manner.[72] All the instructions should be preserved in the record

of Mobile, 119 Ala. 595, 24 So. 565; Sams Automatic C. Co. v. League, 25 Colo. 129, 54 Pac. 642; Colby v. McDermont (N. Dak.), 71 N. W. 772; Castle v. Boys, 19 Ky. L. R. 345, 40 S. W. 242; Merrill v. Equitable F. & S. I. Co. v. 49 Neb. 198, 68 N. W. 365; Costello v. Kottas, 52 Neb. 15, 71 N. W. 950; Prichard v. Budd, 76 Fed. 710; Schaff v. Miles, 31 N. Y. S. 134, 10 Misc. 395; Schwabeland v. Buchler, 31 N. Y. S. 143, 10 Misc. 773; Ward v. S. (Tex. Cr. App.), 29 S. W. 274; Werner v. Jewett, 54 Kas. 530, 38 Pac. 793; Keokuk Stove Works v. Hammond, 94 Iowa, 694, 63 N. W. 563; Pike v. Sutton, 21 Colo. 84, 39 Pac. 1084; Ryan v. Conroy, 33 N. Y. S. 330, 85 Hun, (N. Y.) 544; Dunbar v. S. 34 Tex. Cr. App. 596, 31 S. W. 401; Phillips v. S. (Tex. Cr. App.), 30 S. W. 1063; Sigler v. McConnell, 45 Neb. 598, 63 N. W. 870; Partin v. Com. 17 Ky. L. R. 499, 31 S. W. 874; Moore v. S. (Tex. Cr. App.), 28 S. W. 686; Patterson v. S. (Tex. Cr. App.), 29 S. W. 272; Hardeman v. S. (Miss.), 16 So. 876; S. v. Owens, 44 S. Car. 324, 22 S. E. 244; S. v. Knutson, 91 Iowa, 549, 60 N. W. 129; S. v. Paxton, 126 Mo. 500, 29 S. W. 705; Bragger v. Oregon S. L. R. Co. 24 Utah, 391, 68 Pac. 140; American Cotton Co. v. Beasley, 116 Fed. 256; Mount v. Brooklyn Union Gas Co. 76 N. Y. S. 533; Andrysick v. Stakowski, 159 Ind. 428, 63 N. E. 854; Engel v. Dado (Neb.), 92 N. W. 629; Challis v. Lake, 71 N. H. 90, 57 Atl. 260; Delhaney v. S. 115 Ind. 502, 18 N. E. 49; Minor v. Parker, 72 N. Y. S. 549, 65 App. Div. 120; Leverich v. S. 105 Ind. 277, 4 N. E. 852; Livingston v. Moore (Neb.), 89 N. W. 289; Trogden v. Deckard, 47 Ind. 572; Marshalton L. Ins. Co. v. Doll, 80 Ind. 113; Sutherland v. Venard, 34 Ind. 390 (oral instructions must be preserved by bill of exceptions to be of any avail on review); Casey v. Ballou Banking Co. 98 Iowa, 107, 67 N. W. 98; Hall v. Incorporated Town, 90 Iowa, 585, 58 N. W. 881; Robbins v. Brockton St. R. Co. 180 Mass. 51, 61 N. E. 265; Krack v. Wolf, 39 Ind. 88; Eddy v. Lafayette, 163 U. S. 456, 16 Sup. Ct. 1082; Runnells v. Village of P. 109 Mich. 512, 67 N. W. 558; Longyear v. Gregory, 110 Mich. 277, 68 N. W. 116; Village of Monroeville v. Root, 54 Ohio St. 523, 44 N. E. 237; Ranson v. Weston, 110 Mich. 240, 68 N. W. 152; Thirkfield v. Mountain V. C. Asso. 12 Utah, 76, 41 Pac. 564; Simonds v. City of B. 93 Wis. 40, 67 N. W. 40; S. v. Nelson, 132 Mo. 184, 33 S. W. 809; S. v. Hilsabeck, 132 Mo. 348, 34 S. W. 38; S. v. Jones, 134 Mo. 254, 35 S. W. 607.

[71] Indianapolis, D. & S. R. Co. v. Pugh, 85 Ind. 279. See Leach v. Hill, 97 Iowa, 81, 66 N. W. 69.

[72] Long v. Shull, 7 Pa. Super. Ct. 476; Dubois v. Decker, 114 Fed. 267; Sargent v. Chapman, 12 Colo. App. 529, 56 Pac. 194; S. v. Rover. 11 Nev. 343; Warren v. Nash (Ky.),

to enable the court to determine whether the errors complained of were cured or not by considering the instructions together as a whole.[73] It must appear from the bill of exceptions that it contains all the instructions given and refused, otherwise the assignment of errors as to the instructions will not be considered on appeal or error by the reviewing court.[74]

The record should affirmatively show that the instructions contained therein were the only instructions given and refused.[75] By a rule of long standing of the Supreme Court of the United States only such parts of the charge to which exceptions were taken need be embodied in the record by the bill of exceptions for the purpose of review by that court.[76]

But the more recent authorities seem to hold that a positive or direct recital in a bill of exceptions that it contains all the evidence or all the instructions given and refused, is not essential to make it complete; that it will be regarded as complete unless it affirmatively appears from the record that other instructions were given or refused.[77]

§ 360. Presumption in absence of all instructions.—It will be presumed that the trial court fully and correctly stated the law applicable to the issues, or contentions of the parties if the entire charge is not embodied in the record.[78] Where the instructions are not contained in the record showing that exceptions were properly taken it will be presumed that the court

67 S. W. 274; Whitney E. I. Co. v. Anderson, 172 Mass. 1, 51 N. E. 182; Craggs v. Bohart (Indian Ter.), 69 S. W. 931; Collins v. Breen, 75 Wis. 606, 44 N. W. 769; Freeborn v. Norcross, 49 Cal. 313; Greenabaum v. Millsaps, 77 Mo. 474; Cheaney v. S. 36 Ark. 74; Montgomery v. Harker, 81 Mo. 63; Kelleher v. City of Keokuk, 60 Iowa, 473, 15 N. W. 280; Berrenberg v. City of Boston, 137 Mass. 231; Bean v. Green, 33 Ohio St. 452.

[73] Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253; Oregon R. & N. Co. v. Galliber, 2 Wash. Ter. 70, 3 Pac. 615.

[74] Board, &c. v. Gibson, 158 Ind. 471, 63 N. E. 982. See, also, as to refused instructions, Gill v. Skelton, 54 Ill. 158; Kleinschmidt v. McDermott, 12 Mont. 309, 30 Pac. 393; Keeling v. Kuhn, 19 Kas. 441; Pierson v. S. 12 Ala. 149; Michigan City v. Phillips (Ind.), 69 N. E. 701.

[75] Barton v. S. 154 Ind. 670, 57 N. E. 515; Lake E. & W. R. Co. v. Holland (Ind.), 69 N. E. 141. Contra: Cox v. P. 109 Ill. 459.

[76] Crane v. Crane, 5 Pet. (U. S.), 356; Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500.

[77] Warren v. Nash, 24 Ky. L. R. 479, 68 S. W. 658, citing Garrott v. Ratliff, 83 Ky. 386; Louisville & N. R. Co. v. Finley, 86 Ky. L. R. 294, 5 S. W. 753.

[78] Hawkins v. Collier, 106 Ga. 18, 31 S. E. 755; Myer v. Suburban Home Co. 55 N. Y. S. 566, Misc. 686.

properly instructed the jury on its own motion.[79] In the absence of some of the instructions it will be presumed that the court properly instructed the jury though the portion of the charge appearing in the record is susceptible of two meanings.[80] Also if erroneous instructions were given it will be presumed, in the absence of the full charge, that the errors were cured by others given which are not in the record.[81]

But where the instructions given contain errors that could not be cured by others, then it may be proper to reverse on account of erroneous instructions although all that were given do not appear in the record.[82] And where all of the instructions are not in the record it will be presumed that the ones refused are covered by those given.[83] In passing upon alleged errors it will be presumed that the trial court properly instructed the jury in the absence of a showing to the contrary, or where the instructions are not set out in the abstract as required by the rules of the court.[84] But it has been held that the reviewing court will not presume that a refused instruction was given in the general charge merely because such general charge is not embodied in the record.[85] That the instructions were given or refused or modified in the form they appear in the record will be presumed

[79] Richardson v. City of Eureka, 96 Cal. 443; Gross Lumber Co. v. Coody, 99 Ga. 775, 27 S. E. 169; Marshall v. Lewark, 117 Ind. 377, 20 N. E. 253; Ford v. Ford, 110 Ind. 89, 10 N. E. 648; Becknell v. Becknell, 110 Ind. 42, 10 N. E. 414; Lehman v. Hawks, 121 Ind. 546, 23 N. E. 670; Hancock v. Shockman (Ind. Ter.), 69 S. W. 826; Cobb v. Malone, 87 Ala. 514, 6 So. 299; McPhee v. McDermott, 77 Wis. 33, 45 N. W. 808; Huff v. Aultman, 69 Iowa, 71, 28 N. W. 440; McFadyen v. Masters, 11 Okla. 16, 66 Pac. 284; Hewey v. Nourse, 54 Me. 256; P. v. Niles, 44 Mich. 606, 7 N. W. 192; Bean v. Green, 38 Ohio St. 444; Linton v. Allen, 154 Mass. 432, 28 N. E. 780; Klink v. P. 16 Colo. 467, 27 Pac. 1062.

[80] Davis v. S. 25 Ohio St. 369.

[81] Bell v. S. 69 Ga. 752; Fernbach v. City of Waterloo, 76 Iowa, 598, 41 N. W. 370; P. v. Von. 78 Cal. 1, 20 Pac. 35.

[82] Meyer v. Temme, 72 Ill. 577.

[83] Clore v. McIntire, 120 Ind. 266, 22 N. E. 128; Puett v. Beard, 86 Ind. 108; Vancleave v. Clark, 118 Ind. 61, 20 N. E. 527; Lehman v. Hawks, 121 Ind. 541, 23 N. E. 670; Garrett v. S. 109 Ind. 527, 10 N. E. 570; Chicago, M. & St. P. R. Co. v. Yando, 127 Ill. 214, 20 N. E. 70; Pace v. Payne, 73 Ga. 675; Gill v. Skelton, 54 Ill. 158; Bolen v. S. 26 Ohio St. 371; Hearn v. Shaw, 72 Me. 187; Stearnes v. Johnson, 17 Minn. 142.

[84] Guerin v. New Eng. T. & T. Co. 70 N. H. 133, 46 Atl. 185; McGraw v. Chicago, R. & I. P. R. Co. (Neb.), 81 N. W. 306; Nighbert v. Hornsby, 100 Tenn. 82; 42 S. W. 1060; Milwaukee Harvester Co. v. Tymich, 68 Ark. 225, 58 S. W. 252; Scott v. Smith, 70 Ind. 298.

[85] Alabama M. R. Co. v. Guilford, 114 Ga. 627, 40 S. E. 794.

on review, notwithstanding contentions to the contrary.[86] And where it appears that the trial court instructed the jury to find on special issues, it will be presumed on review that one of the parties to the cause requested such instructions, in the absence of a showing to the contrary.[87]

§ 361. **When considered in absence of evidence.**—As a general rule the assignment of errors on the giving or refusing of instructions will not be considered on appeal or writ of error unless the record contains all the evidence on which the instructions complained of were based.[88] Or at least all the evidence on the particular question to which the instruction relates must be preserved by a bill of exceptions.[89] It is seldom necessary, however, to set out all the evidence where it is only desirable to question the decision of the trial court in its rulings as to the giving or refusing of instructions.[90] Enough of the facts should be preserved to show the materiality and legitimate bearing of

[86] Indiana, D. & W. R. Co. v. Hendrain, 190 Ill. 504; Riley v. Allen, 154 Ind. 176, 56 N. E. 240; Tusley v. White (Ky.), 54 S. W. 169; Sternberg v. Mailhos, 99 Fed. 43; Holt v. Roberts, 175 Mass. 558, 56 N. E. 702; Smith v. Kennard, 54 Neb. 523, 74 N. W. 859; Cherry v. Cox, 1 Indian Ter. 578, 45 S. W. 122; Western U. Tel. Co. v. Baker, 85 Fed. 690; Texas Brew. Co. v. Walters (Tex. Cv. App.), 43 S. W. 548; Little v. Town, &c. 102 Wis. 250, 78 N. W. 416.

[87] Belknap v. Grover (Tex. Cv. App.), 56 S. W. 249. Questions of law will not be passed upon in a court of review unless they were submitted to the jury by the trial court in the form of instructions and preserved in the record, Gasch v. Neihoff, 162 Ill. 395, 44 N. E. 731.

[88] Geiser Mfg. Co. v. Krogman (Iowa), 82 N. W. 938; Jacksonville St. R. v. Walton, 42 Fla. 54, 28 So. 59; Griffith v. Potter, 65 N. Y. S. 689; Pierce v. Engelkemier, 10 Okla. 308, 61 Pac. 1047. See Wright v. Griffey, 146 Ill. 394, 397, 34 N. E. 941; Berry v. Rood, 168 Mo. 316, 67 S. W. 644; Felmat v. Southern Ex. Co. 123 N. Car. 499, 31 S. E. 722; Advance Thresher Co. v. Esteb. 41 Ore. 469, 69 Pac. 447; Eickhof v. Chicago N. S. St. R. Co. 77 Ill. App. 196; Yates v. U. S. 90 Fed. 57; Hedrick v. Smith, 77 Tex. 608, 14 S. W. 197; Philbrick v. Town of University Place, 106 Iowa, 352, 76 N. W. 742; Mexican C. R. Co. v. Wilder, 114 Fed. 708; Warbasse v. Card, 74 Iowa, 306, 37 N. W. 383; Owens v. Callaway, 42 Ala. 301; Love v. Moynehan, 16 Ill. 277; Board Com'rs v. Boyd, 31 Kas. 765, 3 Pac. 523; Ward v. S. 52 Ind. 454; Law v. Merrills, 6 Wend. (N. Y.), 268.

[89] Sherwin v. Rutland, 74 Vt. 1, 51 Atl. 1089; Lesser Cotton Co. v. St. Louis, I. M. & S. R. Co. 114 Fed. 133; Hill v. S. 43 Ala. 335; Jones v. Foley, 121 Ind. 180, 22 N. E. 987; Phoenix Life Ins. Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500; Wilcox v. McCune, 21 Iowa, 294; Whitehead & A. M. Co. v. Ryder, 139 Mass. 366, 31 N. E. 736; Horton v. Cooley, 135 Mass. 589; Blige v. S. 20 Fla. 742.

[90] Illinois Cent. R. Co. v. O'Keefe, 154 Ill. 508, 513, 39 N. E. 606; Nason v. Letz, 73 Ill. 371, 374.

the instructions, otherwise the action of the trial court in giving or refusing them cannot be reviewed on appeal or error.[91]

The action of the trial court in refusing to give an instruction cautioning the jury as to improper remarks of counsel in argument, will not be considered on review, unless the objectionable remarks are preserved in the record by bill of exceptions.[92] But if instructions are radically wrong under any state of facts and direct the minds of the jury to an improper basis on which to place a verdict, error may be assigned on such instructions though the evidence is not preserved in the record.[93] And error may be assigned as to the giving or refusing of instructions without preserving all the evidence in the record where the instructions are based upon incompetent evidence.[94] So, if the pleadings, irrespective of the evidence, render the instructions erroneous, error may be assigned as to the giving of instructions without preserving all the evidence.[95]

§ 362. Presumptions in absence of evidence.—And if the evidence is not preserved in the record it will be presumed that the instructions given were applicable to the facts of the case.[96] Thus, where it appears from the bill of exceptions that an instruction was refused on the ground that it was inapplicable, a court of review will not further inquire into the propriety of the ruling, unless the evidence is embodied in the record to which the instruction is claimed to apply.[97]

[91] Leavitte v. Randolph County, 85 Ill. 509; Schmidt v. Chicago & N. R. Co. 83 Ill. 412; Kelleher v. City of Keokuk, 60 Iowa, 473, 15 N. W. 280.

[92] Kipperly v. Ramsden, 83 Ill. 354.

[93] Downing v. S. (Wyo.), 69 Pac. 264; Murphy v. Johnson, 45 Iowa, 57; Wenning v. Teeple, 144 Ind. 189, 41 N. E. 600; Sigsbee v. S. (Fla.), 30 So. 816; Wier Plow Co. v. Walmsley, 110 Ind. 242, 11 N. E. 232; Baltimore & O. & C. R. Co. v. Rowan, 104 Ind. 88, 3 N. E. 627; Rapp v. Kester, 125 Ind. 82, 25 N. E. 141; Cincinnati, H. & I. R. Co. v. Clifford, 113 Ind. 460, 15 N. E. 524; S. v. Broadwell, 73 Iowa, 765, 35 N. W. 691; S. v. Loveless, 17 Nev. 424, 30 Pac. 1080; Willis v. S. 27 Neb. 98, 42 N. W. 920; Tharp v. S. 15 Ala. 749.

[94] Lane v. Miller, 17 Ind. 58.

[95] Pfeuffer v. Maltby, 54 Tex. 454; Duggins v. Watson, 15 Ark. 118; Mason v. McCampbell, 2 Ark. 506.

[96] Yates v. United States, 90 Fed. 57; Philbrick v. Town, &c. 106 Iowa, 352, 76 N. W. 742; Deering & Co. v. Hannah, 93 Mo. App. 618, 67 S. W. 714; Chestnut v. Southern I. R. Co. 157 Ind. 509, 62 N. E. 32; Ball v. S. (Iowa), 92 N. W. 691; Shafer v. Stinson, 76 Ind. 374; Blizzard v. Bross, 56 Ind. 74.

[97] Pittman v. Gaty, 10 Ill. 186, 190.

§ 363. Error caused at one's own request.—A party has no right to complain of error in the giving of an instruction when a like error appears in an instruction given at his own request on the same subject.[98] But this rule should not preclude one from objecting to an erroneous instruction which operates against him, merely because it is given in connection with one he may have asked, although the one asked by him may also be illegal.[99] So, if the instruction complained of by a party states a rule or principle substantially the same as stated in an instruction given at his own request, he cannot assign error on that subject;[100] or if he uses a particular word or clause in the same sense as the

[98] Chicago & A. R. Co. v. Harrington, 192 Ill. 10, 25; Consolidated Coal Co. v. Haenni, 146 Ill. 614, 620, 35 N. E. 162; Greene v. Greene, 145 Ill. 264, 273, 33 N. E. 941; Springer v. City of Chicago, 135 Ill. 552, 560, 26 N. E. 514; Ochs v. P. 124 Ill. 399, 425, 16 N. E. 662; Illinois Cent. R. Co. v. Beebe, 174 Ill. 13, 27, 50 N. E. 1019; Peirce v. Walters, 164 Ill. 561, 45 N. E. 1068; Chicago, Burlington & Q. R. Co. v. Murowski, 179 Ill. 77, 53 N. E. 572; Egbers v. Egbers, 177 Ill. 82, 89, 52 N. E. 285; Hacker v. Munroe & Son, 176 Ill. 384, 394, 52 N. E. 12; Chicago City R. Co. v. Allen, 169 Ill. 287, 48 N. E. 414; Lake Shore & Mich. S. R. Co. v. Conway, 169 Ill. 505, 48 N. E. 483; Chicago & A. R. Co. v. Sanders, 154 Ill. 531, 39 N. E. 481; Swift & Co. v. Rutkowski, 167 Ill. 156, 160, 47 N. E. 362; Hafner v. Herron, 165 Ill. 242, 251 46 N. E. 211; Boecker v. City of Nuperville, 166 Ill. 151, 48 N. E. 1061; Cicero St. Car Co. v. Meixner, 160 Ill. 320, 328, 43 N. E. 893; Baltimore & O. S. R. Co. v. Then, 159 Ill. 535, 42 N. E. 971; Hill v. Bahrns, 158 Ill. 304, 320, 41 N. E. 912; Funk v. Babbitt, 156 Ill. 408, 41 N. E. 166, 41 N. E. 166; Judy v. Sterrett, 153 Ill. 94, 101, 38 N. E. 633; City of Beardstown v. Smith, 150 Ill. 169, 175, 37 N. E. 211; Springfield C. R. Co. v. Puntenney, 200 Ill. 12; American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068; Hess v. Preferred M. M. A. Asso. 112 Mich. 196, 70 N. W. 460; McDonnell v. Nicholson, 67 Mo. App. 408; Sibley Warehouse & S. Co. v. Durand & K. Co. 65 N. E. 676; S. v. Martin, 166 Mo. 565, 66 S. W. 534; Bishop v. P. 200 Ill. 37, 65 N. E. 421; Slack v. Harris, 200 Ill. 115, 65 N. E. 669; West Chicago St. R. Co. v. Buckley, 200 Ill. 262, 65 N. E. 708; Jacksonville St. L. R. Co. v. Wilhite, 209 Ill. 84, 87; Collier v. Gavin, (Neb.), 95 N. W. 842.

[99] Oneil v. Orr, 5 Ill. (4 Scam.), 3.

[100] City of Beardstown v. Smith, 150 Ill. 169, 175, 37 N. E. 211; Chicago & A. R. Co. v. Kelly, 182 Ill. 267, 54 N. E. 979; Louisville, N. A. & C. R. v. Shires, 108 Ill. 617, 631; Foster v. Pitts, 63 Ark. 387, 38 S. W. 1114; International & G. N. R. Co. v. Newman (Tex. Cv. App.), 40 S. W. 854; Olferman v. Union D. R. Co. 125 Mo. 408, 28 S. W. 742; Omaha Fair & E. Asso. v. Missouri Pac. R. Co. 42 Neb. 105, 60 N. W. 330; International & G. N. R. Co. v. Sun, 11 Tex. Cv. App. 386, 33 S. W. 558; Byrd v. Ellis (Tex. Cv. App.), 35 S. W. 1070; Needham v. King, 95 Mich. 303, 54 N. W. 891; Hazell v. Bank of Tipton, 95 Mo. 60, 8 S. W. 173; Sibley Warehouse Co. v. Durand Co. 200 Ill. 357, 65 N. E. 676; Illinois Life Ins. Co. v. Wells, 200 Ill. 453, 65 N. E. 1072; Cleveland, C. C. & St. L. R. Co. v. Patton, 203 Ill. 379, 67 N. E. 804.

other party, he cannot complain of error in that respect.[101] Thus, where the plaintiff uses the words "ordinary care" in an instruction without defining that expression he will not be permitted to complain of error that the defendant's instructions contain the same term without defining it.[102]

Where a question is submitted to the jury by instruction at the special request of both parties neither will be heard to complain of the giving of instructions on that particular question. A party cannot ask the court to rule upon a certain branch of the case and then be heard to say that the court had no right to thus rule at all.[103] So, where an instruction is given by agreement of the parties they are precluded from assigning it as a cause of error whether it states a correct principle of law or not.[104] Or if both parties have given instructions substantially on the same theory, neither is in a position to complain of erroneously instructing the jury as to such theory.[105]

On the same principle, he who procures an erroneous instruction to be given which is in conflict with a proper one given at the instance of his opponent, will not be heard to complain of error in the giving of instructions.[106] Thus, where a party by his instructions asks to have a material question submitted to the jury he will not be permitted, on appeal, to complain that

[101] Eastman v. Curtis, 67 Vt. 432, 32 Atl. 232; Keeler v. Herr, 54 Ill. App. 468.

[102] Quirk v. St. Louis N. E. Co. 126 Mo. 279, 28 S. W. 1080.

[103] Illinois Cent. R. Co. v. Latimer, 128 Ill. 171, 21 N. E. 7; Greene v. Greene, 145 Ill. 272, 33 N. E. 941, 69 N. E. 925. See Spring Valley Coal Co. v. Robizas, 207 Ill. 22; Gould v. Magnolia Metal Co. 207 Ill. 178, 69 N. E. 896; Jordan v. Philadelphia, 125 Fed. 825; Little Dorritt Gold Min. Co. v. Arapahoe Gold Min. Co. 30 Colo. 431, 71 Pac. 389; Ward v. Bass, (Indian Ter.) 69 N. W. 879; Stoner v. Mau, (Wyo.) 73 Pac. 548; Chicago B. & Q. R. Co. v. Johnson, (Neb.) 95 N. W. 614.

[104] Emory v. Addis, 71 Ill. 275.

[105] Illinois Cent. R. Co. v. Harris, 162 Ill. 200, 44 N. E. 498; Bracken v. Union Pac. R. Co. 75 Fed. 347; East St. L. C. R. Co. v. Allen, 54 Ill. App. 32; Dunnington v. Frick Co. 60 Ark. 250, 30 S. W. 212. See Hayden v. McCloskey, 161 Ill. 351. 43 N. E. 1091; Queen City Mfg. Co. v. Blalack (Miss.), 18 So. 800; Gould v. Magnolia Metal Co. 207 Ill. 178, 69 N. E. 896. A party cannot except to the ruling of the court in refusing to give instructions for his opponent, Bailey v. Campbell, 2 Ill. (1 Scam.), 46.

[106] Christian v. Connecticut Mut. Life Ins. Co. 143 Mo. 460, 45 S. W. 268; Conners v. Indiana, I. & Q. R. Co. 193 Ill. 464, 473, 62 N. E. 221; Chicago, P. & St. L. R. Co. v. Leach, 152 Ill. 249, 38 N. E. 556; Leslie v. S. 35 Fla. 171, 17 So. 555; Sanders v. Brock (Tex. Cv. App.), 31 S. W. 311; Moore v. Graham, 29 Tex. Cv. App. 235, 69 S. W. 200. See Blanchard v. Jones, 101 Ind. 542.

the evidence was not sufficient to warrant the submission of such question to the jury.[107] So, where a party, against objection, introduces evidence which is outside of the issues presented by the pleadings, will not be heard to complain of the giving of instructions based on such evidence.[108] On appeal or writ of error a party will be held to the position assumed by him in the trial court and will be estopped to complain in the court of review, of an erroneous ruling made by the trial court as to the instructions if the court was induced to make such ruling by the procurement or invitation of such party.[109]

§ 364. **After cause is remanded.**—On the second trial of a cause after it has been remanded for a new trial, for the reason that the trial court erred in refusing instructions, the refusal of the same instructions on the second trial is error where the evidence was substantially the same as on the former trial.[110] After a case has been remanded for a new trial, the giving of an instruction which embodies the language of the court of review, stating that the Supreme Court is authority for such instruction, is improper.[111]

[107] Boyer v. Soules, 105 Mich. 31, 62 N. W. 1000. See Light v. Chicago, M. & St. P. R. Co. 93 Iowa, 83, 61 N. W. 380; Means v. Gridley, 164 Pa. St. 387, 30 Atl. 390; Hahn v. Miller, 60 Iowa, 96, 14 N. W. 119; Spears v. Town of Mt. Ayr, 66 Iowa, 721, 24 N. W. 504.

[108] Bowen v. Carolina, C. G. & C. R. Co. 34 S. Car. 217, 13 S. E. 421.

[109] North Chicago Elec. R. Co. v. Peuser, 190 Ill. 67, 72. See Matthews v. Granger, 196 Ill. 164, 63 N. E. 658; Iron M. Bank v. Armstrong, 92 Mo. 265, 4 S. W. 720.

[110] Watkins v. Moore, 196 Pa. St. 469, 46 Atl. 482. See English v. Yore, 123 Mich. 701, 82 N. W. 659.

[111] Board of Comrs. v. Vicker, 62 Kas. 25, 61 Pac. 391.

FORMS

CHAPTER XXVII.

WITNESSES IN CIVIL OR CRIMINAL CASES.

Sec.
365. Jury judges of credibility of witnesses.
366. Jury weigh the testimony.
367. Impeachment of witnesses.
368. Witness testifying wilfully falsely.
369. Party witness in his own behalf.
370. Husband a witness for wife.
371. Positive and negative testimony.

Forms of Instructions—Generally.—When a party prepares instructions to be given by the court, he should provide them with a title, as in a pleading, with the name of the court and with the names of the parties. Then should follow a request, addressed to the court, that the instructions submitted, be given; as follows:

State of Indiana, } In the Marion Circuit Court,
County of Marion. } September Term, 1903.
John Doe }
v. }
Richard Roe. }

The defendant in the above entitled cause, at the conclusion of the evidence and before the beginning of the argument, hereby requests the court: (to instruct the jury in writing and)[1] to give to the jury each of the following instructions numbered from one to five, inclusive, to wit, etc.

Each series of instructions, or if it seems necessary to make

[1] This clause may be omitted if written instructions are not desired.

the sense complete, each instruction, that is modelled upon the forms outlined in the following pages, should be commenced by the following statement: "The court instructs the jury," or "You are hereby instructed that," or "The jury is hereby instructed that," or the like.

§ 365. **Jury judges of credibility of witnesses.**—(1) The law makes you the exclusive judges of the weight of the testimony and the credibility of the witnesses. You are sworn to find what are the true facts from the testimony before you without being influenced in the least by any feeling of sympathy or prejudice, giving such weight and credit to the testimony of the different witnesses, as you may believe the same entitled to; but after you have so found the facts, then, in determining what your verdict will be upon these facts, you have sworn to be governed by the law as set forth in this charge.[2]

(2) You are the judges of the evidence and credibility of the witnesses. It is your duty to reconcile all the statements of the several witnesses so as to believe all the testimony if you can. But if you cannot do so on account of contradictions, then you have the right to believe the witnesses whom you deem most worthy of credit, and disbelieve those least worthy of credit. And in weighing the testimony it is proper for you to take into consideration all the surrounding circumstances of the witnesses, their interest in the result of the action, if any, and their opportunity of knowing the truth of the matter about which they testify, and from a preponderance of all the evidence thus considered, you will determine the rights of the parties to this action and find a verdict accordingly.[3]

(3) You are the exclusive judges of the weight of the evidence before you, and of the credit to be given to the witnesses who have testified in the case. If there is any conflict in the testimony you must reconcile it if you can. If you cannot, you may believe or disbelieve any witness or witnesses as you may or may not think them entitled to credit. In civil cases juries are authorized to decide according as they may think the evidence preponderates in favor of one side or another.[4]

[2] Smith v. Merchants and Printers' Nat. Bank (Tex. Cv. App.), 40 S. W. 1038.

[3] Lake E. & W. R. Co. v. Parker, 94 Ind. 95.

[4] Liverpool & L. G. Ins. Co. v. Ende, 65 Tex. 124.

(4) You are the judges of the credibility of each and every witness, and you should give the testimony of each and every witness such weight as, from all the facts and circumstances in proof before you in this case, you shall deem the same entitled to; it is your duty, if you can, to reconcile the testimony of the witnesses, if there be any disagreement between them; but, if you cannot, then you must determine, from all the evidence before you, which of the witnesses is entitled to the greater credit.[5]

(5) The credibility of the witnesses is a question exclusively for the jury; and the law is that where a number of witnesses testify directly opposite to each other or one another, the jury are not bound to regard the weight of the evidence as evenly balanced merely because of numbers. The jury have a right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor and fairness, their apparent intelligence or lack of intelligence, and from all the other surrounding circumstances appearing on the trial, which witnesses are the more worthy of credit, and to give them credit accordingly.[6]

(6) The credibility of the witnesses is a question exclusively for the jury. You have the right to determine from the appearance of the witness on the stand, his manner of testifying and his apparent candor and fairness, interest or lack of interest in the case, if any should appear, his bias or prejudice, if any should appear from all the surrounding circumstances, if any appear on the trial, which witnesses are more worthy of credit, and give credit accordingly.[7]

(7) You are the sole judges of the credibility of the witnesses, of the weight of the evidence, and of the facts. It is your right to determine from the appearance of the witnesses on the stand, their manner of testifying, their apparent candor or frankness or the lack thereof, their apparent intelligence or want of intelligence, which of the witnesses are more worthy of credit,

[5] Albright v. Brown, 23 Neb. 141, 36 N. W. 297.

[6] North C. St. R. Co. v. Wallner, 206 Ill. 276, 69 N. E. 6.

[7] Citizens' Gas & Oil M. Co. v. Whipple, (Ind.), 69 N. E. 560; Hogan v. Citizens' R. Co. 150 Mo. 45, 51 S. W. 473.

and to give weight accordingly. In determining the weight to be given to the testimony of the witnesses you are authorized to consider their relationship to the parties, if any is shown, their interest, if any, in the result of this suit, their temper, feeling or bias, if any has been shown, their demeanor on the stand, their means of information and the reasonableness of the story told by them, and to give weight accordingly.[8]

(8) You are the exclusive judges of the credibility of the witnesses, and it is your duty to reconcile any conflict that may appear in the testimony as far as may be in your power, upon the theory that each witness has sworn to the truth; when this cannot be done, you may consider the conduct of the witnesses upon the witness stand; the nature of the testimony given by them; to what extent, if any, they are corroborated or contradicted by other testimony; their interest, if any, in the cause; their relation to the parties, and such other facts appearing in the evidence as will, in your judgment, aid you in determining whom you will or will not believe; and you may also, in considering whom you will or will not believe, take into account your experience and relations among men.[9]

§ 366. Jury weigh the testimony.—(1) In judging of the weight and importance to be given to the testimony of any of the witnesses who have testified, you should take into account their means of knowledge of the facts of which they speak, and you have a right to judge from your own common observation of the ability of persons to judge of given facts from given opportunities, and you are not obliged to accept as true the testimony of any witness or witnesses, if in your opinion, judging from such common observation, they are or may be mistaken concerning the facts of which they speak.[10]

(2) In determining the weight to be given to the testimony of the different witnesses, you should take into account the interest or want of interest, if any, they have in the case, their manner on the witness stand, the probability or improbability

[8] S. v. Morgan, (Utah), 74 Pac. 528; Miller v. S. (Miss.), 35 So. 690.

[9] Jenny Elec. Co. v. Branham, 145 Ind. 322, 41 N. E. 448. See Pfaffenback v. Lake S. & M. S. R. Co. 142 Ind. 249, 41 N. E. 530.

[10] Bressler v. P. 117 Ill. 422, 443, 8 N. E. 62.

of their testimony with all the other facts and circumstances before you, which can aid you in weighing their testimony.[11]

(3) In determining the weight to be given to the testimony of a witness, you will take into consideration the intelligence of the witness, the circumstances surrounding the witness at the time concerning which he testifies; his interest, if any, in the event of the suit; his bias or prejudice, if any; his manner on the witness stand; his apparent fairness or want of fairness, the reasonableness or unreasonableness of his testimony; his knowledge and means of observation, the character of his testimony—whether negative or affirmative—and all matters and facts and circumstances shown in evidence on the trial bearing upon the question of the weight to be given to his testimony, and give each witness' testimony such weight as to you it may seem fairly entitled to.[12]

(4) You are to take into account, in weighing the testimony of any witness, his interest or want of interest in the result of the case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence. You have a right to believe all the testimony of a witness or believe it in part and disbelieve it in part, or you may reject it altogether as you may find the evidence to be. You are to believe as jurors what you would believe as men, and there is no rule of law which requires you to believe as jurors what you would not believe as men.[13]

(5) While the jury are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness, sworn on behalf of the defendant, simply because such witness was an employé of the defendant, but it is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness, and to determine the credibility of such employé by the same rules and tests

[11] Deal v. S. 140 Ind. 354, 39 N. E. 930.

[12] Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 162, 62 N. E. 831. Instructions that the jury must, shall, or will, take certain matters into consideration: Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463.

[13] Dodge v Reynolds, (Mich.), 98 N. W. 738.

by which they would determine the credibility of any other witness.[14]

(6) The jury, in determining whether witnesses should be believed or not, are not bound by the opinions of other witnesses, but have a right to consider all the testimony in the case, the motives and interest of the witness, the nature of his testimony and all the facts in evidence throwing any light upon the point.[15]

(7) The jury are the sole judges of the facts of this case and of the credit, if any, to be given to the respective witnesses who have testified; and in passing upon the credibiity of the witnesses, the jury have a right to take into consideration, not only their testimony itself, but also their conduct, demeanor or bearing while testifying on the witness stand, their objects, purposes or designs, if any have been shown by the evidence in so testifying, their feelings of prejudice against the defendant, if any have been shown, and their means of knowing the facts and circumstances in evidence, if any, tending to expose the feelings or purposes of such witnesses.[16]

(8) In judging of the weight and importance to be given to the testimony of any witness who has testified, you have a right to judge from your own common observation of the ability of persons to judge of a state of facts from given opportunities; and you should take into consideration the circumstances surrounding the witness at the time concerning which he has testified, the character of his testimony, whether affirmative or negative, the probability or improbability of his testimony, together with all the other facts and circumstances proved, if any have been proved.

You are not obliged to accept as true the testimony of any witness merely because he has testified positively to a fact or state of facts, if in your opinion, judging from your own common observation, he is or may be mistaken concerning the matters and things about which he has testified. You have the right to believe all the testimony of a witness or believe it in

[14] Cicero St. R. Co. v. Rollins, 195 Ill. 219, 63 N. E. 98.

[15] Brown v. S. 75 Miss. 842, 23 So. 422.

[16] Bressler v. P. 117 Ill. 441, 8 N. E. 62.

part and disbelieve it in part, or you may reject it altogether as you may find the evidence to be when considered as a whole.[17]

(9) While you are the sole judges of the credibility of the witnesses who have testified, you have no right to arbitrarily disregard an unimpeached witness simply because he is or has been an employé of the defendant, but you should receive the testimony of such witness in the light of all the evidence, the same as you would receive the testimony of any other witness, and determine his or her credibility by the same rules and tests by which you determine the credibility of any other witness. In determining whether a witness should or should not be believed, you have a right to consider his motives, objects, purposes or designs, if any have been shown by the evidence before you. Whether the testimony of a witness is or is not worthy of belief must be determined by you, not only from his own testimony alone, but from all the other credible evidence and facts and circumstances established by the evidence in the case.[18]

§ 367. Impeachment of witnesses.—(1) The credit of a witness may be impeached by showing that he has made statements out of court contrary to and inconsistent with what he has testified on the trial concerning matters material and relevant to the issues, and when such witness has been thus impeached about matters material and relevant to the issue, you have the right to reject all the testimony of such witness except in so far as the testimony of such witness has been corroborated by other credible evidence.[19]

(2) If a witness is successfully impeached, you will disregard his testimony, unless he is corroborated by other unimpeached testimony or circumstances in the case.[20]

(3) You are at liberty to disregard the statements of any witness or witnesses, if any there be, who have been successfully im-

[17] Bressler v. P. 117 Ill. 443, 8 N. E. 62; Chicago, B. & Q. R. Co. v. Pollock, 195 Ill. 162, 62 N. E. 831; Dodge v. Reynolds (Mich.), 98 N. W. 738; Deal v. S. 140 Ind. 354, 39 N. E. 930; Strong v. S. 63 Neb. 440, 88 N. W. 772.

[18] Cicero St. R. Co. v. Rollins, 195 Ill. 219, 63 N. E. 98; Bressler v. P. 117 Ill. 441, 8 N. E. 62; Brown v. S. 75 Miss. 842, 23 So. 422; McMahon v. P. 120 Ill. 584, 11 N. E. 883; Illinois C. R. Co. v. Haskins, 115 Ill. 308, 2 N. E. 654.

[19] White v. New York, C. & S. L. R. Co. 142 Ind. 654, 42 N. E. 456. See Craig v. Rohrer, 63 Ill. 325.

[20] Holston v. Southern R. Co. 116 Ga. 656, 43 S. E. 29.

peached, either by direct contradiction or by proof of general bad character, unless the statements of such witnesses have been corroborated by other credible evidence.[21]

(4) While the law permits the impeachment of a witness by proving his general reputation for truth and veracity in the neighborhood where he resides to be bad, yet if you believe that the plaintiff, while on the stand, gave a truthful, candid and honest statement of the facts and circumstances surrounding the transaction in question, then you should not disregard his testimony, but you should give it such faith and credit as in your opinion it is entitled to.[22]

(5) Where evidence is given tending to contradict the sworn statement of a witness, that does not, of itself, as a matter of law, take out of the case the testimony of the witness, but it goes to you for what you may deem it worth, as affecting the value of the sworn statements of the witness before you; and it is for you to determine, when all these statements are taken together, how much importance you will attach to the testimony of the witness.[23]

(6) If the jury believe from the evidence that any witness before testifying in this case made any statements out of court concerning any of the material matters, materially different and at variance with what he or she has stated on the witness stand, then the jury are instructed by the court that these facts tend to impeach either the recollection or the truthfulness of the witness, and the jury should consider such facts in estimating the weight which ought to be given to his or her testimony; and if the jury believe from the evidence that the moral character of any witness or witnesses has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given to the testimony of such witness or witnesses.[24]

(7) If the jury find from the evidence, written or oral, or both,

[21] Miller v. P. 39 Ill. 463. See Crabtree v. Hagenbaugh, 25 Ill. 219; Bowers v. P. 74 Ill. 419. See Instructions 3, 5 and 13, in this section; also, Fifer v. Ritter, 159 Ind. 8, 64 N. E. 463.

[22] Roy v. Goings, 112 Ill. 566 (while this instruction is not artistically drawn, it states a correct rule of law).

[23] S. v. Birchard, 35 Ore. 484, 59 Pac. 468.

[24] Smith v. S. 142 Ind. 289, 41 N. E. 595.

that any witness in the case is discredited or impeached as to his testimony on any one material fact, then the jury may, in their discretion, regard the testimony of such witness who is not corroborated or supported, as discredited or impeached as to other statements he has made in his testimony.[25]

(8) You are instructed that while you are the sole judges of the credibility of the witness, you have no right to disregard the testimony of an unimpeached witness simply because such witness is or was an employé of the defendant.[26]

(9) A witness may be impeached by proof of contradictory statements, and if you believe that any witness has been successfully impeached, then it would be your duty to discard the testimony of such witness; but it is for you to say whether or not you will believe the witness sought to be impeached, or the witness brought to impeach him, the credibility of all the witnesses being for you and your consideration. If you believe that any witness has been successfully impeached by showing contradictory statements on some material issue in the case, then you would not be authorized to believe him, unless you find from the evidence that he has been corroborated. He may be corroborated, or he may be sustained by proof of good character, or by other facts and circumstances in the case.[27]

(10) If you find from the evidence that any witness who has testified is a person of bad moral character, you should consider that fact in determining what weight, if any, you will give to his testimony.[28]

(11) Some evidence has been introduced for the purpose of impeaching the testimony of certain witnesses by attempting to show that they have made statements out of court in conflict with their testimony in this case. Witnesses may be impeached in this manner, but whether a witness has been impeached in this manner, and if so, to what extent, are questions of which you are the exclusive judges.[29]

(12) The reputation of a person for truth is made by what his

[25] Dye v. Scott, 35 Ohio St. 194.

[26] Illinois C. R. Co. v. Haskins, 115 Ill. 308, 2 N. E. 654; McMahon v. P. 120 Ill. 584, 11 N. E. 883; Rockford, R. I. & St. L. R. Co. v. Coultas, 67 Ill. 403.

[27] Powell v. S. 101 Ga. 9, 29 S. E. 309; 2 Thompson Tr. § 2426. See also, Smith v. S. 142 Ind. 289, 41 N. E. 595.

[28] Ohio & M. R. Co. v. Crancher, 132 Ind. 277, 31 N. E. 941.

[29] Treschman v. Treschman, 28 Ind. App. 206, 218, 61 N. E. 961.

neighbors generally say of him in that respect. If they generally say he is untruthful, that makes his general reputation for truth bad. On the other hand, if one's neighbors say nothing whatever about him as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good.[30]

(13) You should consider all the evidence in the case, and while it is your duty to reconcile, if possible, the testimony of all the witnesses in the case, you are not bound to believe anything to be a fact because a witness has stated it to be so, provided the testimony of such witness is uncorroborated, and you believe from all the evidence that such witness is mistaken or has intentionally misstated the facts.[31]

(14) The credit of a witness may be impeached by showing that he or she has made statements out of court contradictory to and inconsistent with his or her testimony on the trial, concerning matters material and relevant to the issue, or by proof of general bad character of such witness. And when a witness has been successfully impeached by either of these modes of impeachment, the jury are at liberty to disregard the entire testimony of such witness, unless his or her testimony has been corroborated by other credible evidence. But the jury are not bound to disregard the testimony of a witness thus impeached. If the jury believe that the witness while on the stand gave a truthful, candid and honest statement of the facts and circumstances surrounding the transaction in question, then they should not disregard his or her testimony, notwithstanding such impeachment, but should give it such weight and credit as in their opinion from all the evidence before them it is entitled to. So if the jury believe from the evidence that any witness who has testified in this case, made any statements out of court concerning any of the material matters materially different and at variance with what he or she has stated on the witness stand, then the jury are instructed that such facts tend to impeach the truthfulness of the witness, and the jury should consider

[30] Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961; Davis v. Foster, 68 Ind. 238; Conrad v. S. 132 Ind. 259, 31 N. E. 805, (held not invading the province of the jury).

[31] Strong v. S. 63 Neb. 440, 88 N. W. 772. This instruction is not objectionable; it merely states that the false testimony, whether given corruptly or through mistake, should not influence the decision.

such facts in estimating the weight which ought to be given to his or her testimony; and if the jury believe that the moral character of any witness has been successfully impeached on this trial, then that fact should also be taken into consideration in estimating the weight which ought to be given to the testimony of any such witness.[32]

§ 368. **Witness testifying wilfully falsely.**—(1) The jury are the judges of the credit that ought to be given to the testimony of the different witnesses, and that they are not bound to believe anything to be a fact merely because a witness has stated it to be so, provided the jury believe, from all the evidence, that such witness is mistaken about such fact, or that he has knowingly testified falsely to the same.[33]

(2) If you believe from the evidence that any witness has wilfully testified falsely to any material fact in the case, you are at liberty to disregard the entire testimony of such witness, except in so far as it may be corroborated by the testimony of other credible witnesses or supported by other credible evidence in the case.[34]

(3) If you believe from the evidence, beyond a reasonable doubt, that any witness has wilfully and knowingly testified falsely to any material fact in issue, then you have a right to disregard his entire testimony, except wherein it is corroborated by other credible evidence in the case.[35]

(4) If you believe from the evidence that any witness has heretofore, or on his trial, sworn falsely to any material fact in the case, you may disregard the testimony of such witness altogether.[36]

(5) The jury are the sole judges of the credibility of the several witnesses that have appeared before them, and of the weight or importance to be given to their respective statements or testimony; and if they believe from all that they have seen or

[32] Smith v. S. 142 Ind. 289, 41 N. E. 595; White v. New York C. & S. R. Co. 142 Ind. 654, 42 N. E. 456; Miller v. P. 39 Ill. 463; Roy v. Goings, 112 Ill. 566; S. v. Birchard, 35 Ore. 484, 59 Pac. 468; Dye v. Scott, 35 Ohio St. 194; Powell v. S. 101 Ga. 9, 29 S. E. 309; Ohio & M. R. Co. v. Crancher, 132 Ind. 277, 31 N. E. 941; Holston v. Southern R. Co. 116 Ga. 656, 43 S. E. 29.

[33] Taylor v. Felsing, 164 Ill. 331, 332, 45 N. E. 161.

[34] Trimble v. Ter. (Ariz.), 71 Pac. 932.

[35] Waters v. P. 172 Ill. 372, 50 N. E. 148.

[36] Owens v. S. 80 Miss. 499, 32 So. 153.

heard at the trial that any witness has wilfully sworn falsely to any of the facts mentioned in the instructions herein, as bearing on the plaintiff's alleged claim or defendant's alleged defense thereto, then they are at liberty to disregard entirely the testimony of said witness.[37]

(6) If the jury believe from the evidence that any witness has wilfully and corruptly testified falsely concerning any material matter in dispute, they may disregard the whole or any portion of the testimony of such witness; there is no inflexible rule interposed between the witnesses and the jury requiring the jury to accept or reject all the testimony of any witness.[38]

(7) You are the judges of the credibility of the different witnesses and the weight to be attached to the testimony of each of them, and you are not bound to take the testimony of any witnesses as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proved on the trial that such witness is mistaken in the matters testified to by him, or that he has knowingly testified falsely to any matter material to the issue, or that for any other reason his testimony is untrue or unreliable.[39]

(8) You are the judges of the credibility of the different witnesses and the weight to be attached to the testimony of each of them, and you are not bound to take the testimony of any witness as absolutely true, and you should not do so if you are satisfied from all the facts and circumstances proven on the trial that such witness is mistaken in the matters testified to by him or her, or that he or she has knowingly and intentionally testified falsely to any matter material to the issues, or that for any other reason his or her testimony is untrue or unreliable. You are at liberty to disregard the entire testimony of any such witness, except in so far as his or her testimony may be corroborated by the testimony of other credible witnesses or supported by other credible evidence in the case.[40]

[37] O'Connell v. St. Louis, C. & W. R. Co. 106 Mo. 485, 17 S. W. 494. See S. v. Thompson, 21 W. Va. 746.

[38] Kansas City v. Bradbury, 45 Kas. 383, 25 Pac. 889.

[39] Taylor v. Felsing, 164 Ill. 331, 332, 45 N. E. 161.

[40] Taylor v. Felsing, 164 Ill. 332, 45 N. E. 161; Trimble v. Ter. (Ariz.) 71 Pac. 932; Waters v. P. 172 Ill. 372, 50 N. E. 148; O'Connell v. St. Louis, C. & W. R. Co. 106 Mo. 485, 17 S. W. 494; Kansas City v. Bradbury, 45 Kas. 383, 25 Pac. 889.

§ 369. **Party a witness in his own behalf.**—While the law permits the plaintiff to testify in his own behalf, nevertheless the jury have a right, in weighing his testimony and in determining how much credence is to be given it, to take into consideration the fact that he is the plaintiff and his interest in the result of the suit.[41]

§ 370. **Husband a witness for wife.**—Under the law of this state a husband is a competent witness to testify in behalf of his wife in a suit brought by her for personal injury alleged to have been sustained by her. You are instructed that if the testimony of the husband appears to be fair, is not unreasonable and is consistent with itself, and the witness has not been in any manner impeached, then you have no right to disregard the testimony of such witness merely from the fact that he is related by marriage to the plaintiff in the case.[42]

§ 371. **Positive and negative testimony.**—When one witness testifies that a certain fact took place, or that certain words were spoken, and several other witnesses equally credible testify that they were present at the time and place, and had the same means of information, and further testify that such fact did not take place or that such words were not spoken, it is their province to weigh the testimony and give a verdict according to the weight of the testimony as it may preponderate on either side.[43]

[41] West C. St. R. Co. v. Estep, 162 Ill. 130, 44 N. E. 404; West C. St. R. Co. v. Nash, 166 Ill. 528, 46 N. E. 1082.

[42] North C. St. R. Co. v. Wellner, 206 Ill. 275, 69 N. E. 6.

[43] Frizell v. Cole, 42 Ill. 363.

CHAPTER XXVIII.

WITNESSES, IN CRIMINAL CASES ONLY.

Sec.

Defendant a Witness.

372. Instructions for the prosecution.
373. Instructions for defense.
374. Defendant's failure to testify.
375. Demeanor and conduct of witness.
376. Accomplice as witness.
377. Opinions of expert witnesses.
378. Detectives as witnesses.

§ 372. Defendant a witness, instructions for prosecution. (1) Under the law the defendant has the right to testify on his own behalf, but the credibility and weight to be given to his testimony are matters exclusively for the jury. In weighing the testimony of the defendant in this case, you have a right to take into consideration his manner of testifying, the reasonableness or unreasonableness of his account of the transaction and his interest in the result of the verdict as affecting his credibility. You are not required to receive blindly the testimony of the accused as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction.[1]

(2) You are not required to receive blindly the testimony of the accused as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction. And you are not bound to believe the testimony of the defendant any further than it may be corroborated by other credible evidence in the case.[2]

[1] Blair v. S. 69 Ark. 558, 64 S. W. 948, citing: Hamilton v. S. 62 Ark. 543, 36 S. W. 1054; Jones v. S. 61 Ark. 88, 32 S. W. 81.

[2] S. v. Hunter, 118 Iowa, 686, 92 N. W. 872; S. v. Mecum, 95 Iowa, 433, 64 N. W. 286. This instruction was held not objectionable as sing-

(3) That although a defendant has a right to be sworn and to give testimony in his own behalf, the jury are not bound to believe his testimony, but they are bound to give it such weight as they believe it is entitled to; and his credibility, and the weight to be attached to his testimony, are matters exclusively for the jury; and the defendant's interest in the result of the trial is a matter proper to be taken into consideration by the jury in determining what weight ought to be given to his testimony.[3]

(4) In determining the weight to be given to the testimony of the different witnesses you should take into account the interest or want of interest they have in the case, their manner on the witness stand, the probability or improbability of their testimony, with all the other circumstances before you which can aid you in weighing the testimony.

The defendant has testified as a witness, and you should weigh his testimony as you weigh that of any other witness; consider his manner as such witness, and his interest in the result of the trial and the probability or improbability of his testimony.[4]

(5) The defendant is a proper witness in his own behalf, but the jury may consider the fact that he is the accused person testifying in his own behalf, in determining what weight and credibility they will give to his testimony.[5]

(6) The defendants having become witnesses in their own behalf at once become the same as any other witness, and their credibility is to be tested by and subjected to the same tests as are legally applied to any other witness; and in determining the degree of credibility that should be accorded to their testimony, the jury have the right to take into consideration the fact that they are interested in the result of the prosecution, as well as their demeanor and conduct upon the witness stand; and the jury

ling out the defendant. But is it not erroneous in telling the jury that they are not bound to believe the testimony of the defendant any further than it may be corroborated? The defendant may tell the truth, and where the jury believe he tells the truth they should not disregard his testimony, although not corroborated. The jury have a right to believe the testimony of the defendant without corroboration.

[3] Bressler v. P. 117 Ill. 439, 8 N. E. 62.

[4] Anderson v. S. 104 Ind. 472, 4 N. E. 63; Deal v. S. 140 Ind. 354, 39 N. E. 930.

[5] S. v. Jones, 78 Mo. 282.

are to take into consideration the fact, if such is the fact, that they have been contradicted by other credible evidence on matters material to the issue. And the court further instructs the jury that if, after considering all the evidence in the case, they find that the accused have wilfully and corruptly testified falsely to any fact material to the issue in this cause, they have the right to entirely disregard their testimony, excepting in so far as their testimony is corroborated by other credible evidence or facts and circumstances proven by the evidence in the case.[6]

(7) The defendant is a competent witness, and has the right to testify in his own behalf, and when he does so testify he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same tests, and only the same tests, as are legally applied to any other witness; and in determining the degree of credibility that should be accorded to his testimony the jury have the right to take into consideration the fact that he is the defendant and interested in the result of the prosecution, as well as his demeanor and conduct on the witness stand; and the jury are to take into consideration the fact, if such is the fact, that he has been contradicted or corroborated by other credible evidence on matters material to the issue. You have also the right to take into consideration the reasonableness or unreasonablenss of his account of the transaction in question, the probability or improbability of his testimony, with all the other facts and circumstances before you which can aid you in weighing his testimony. You are not required to receive blindly the testimony of the accused as true, but you are to consider whether it is true and made in good faith, or only for the purpose of avoiding conviction. The credibility of the defendant as a witness and the weight to be attached to his testimony are matters exclusively for the jury; and if after considering all the evidence in the case the jury find that the accused has wilfully and corruptly testified falsely to any fact material to the issue in the cause, they have the right to entirely disregard his testimony, excepting in so far

[6] Siebert v. P. 143 Ill. 592, 32 N. E. 431; Purdy v. P. 140 Ill. 49, 29 N. E. 700; Rider v. P. 110 Ill. 11; Hirschman v. P. 101 Ill. 576.

as it has been corroborated by other credible evidence in the case.[7]

§ 373. Instructions for defenses.—(1) The defendant is a competent witness in her own behalf, and you have no right to discredit her testimony from caprice nor merely because she is the defendant. You are to treat her the same as any other witness, and subject her testimony to the same tests, and only the same tests, as are legally applied to the other witnesses, and while you have the right to take into consideration the interest she may have in the result of this trial, you have also the right, and it is your duty, to take into consideration the fact, if such is the fact, that she has been corroborated by other credible evidence.[8]

(2) The jury have no right to disregard the testimony of the defendant through mere caprice, or merely because he is the defendant. The law makes him a competent witness, and you are bound to consider his testimony, and give it such weight as you believe it entitled to, and you are the sole judges of his credibility.[9]

(3) A person charged with the commission of a crime is a competent witness, and may testify in his own behalf. The defendant in this case has availed herself of this privilege, and in determining her guilt or innocence you must consider her testimony. She testifies as an interested witness and from an interested standpoint, and as such you should consider her testimony; and when you do this, together with all the other surrounding circumstances developed by the evidence, give the testimony of the defendant such weight, in connection with the other evidence in the case, as you may think it entitled to, and no more.[10]

[7] Seibert v. P. 143 Ill. 592, 32 N. E. 431; Purdy v. P. 140 Ill. 49, 29 N. E. 700; Blair v. S. 69 Ark. 558, 64 S. W. 948; S. v. Hunter, 118 Iowa 686, 92 N. W. 872; Bressler v. P. 117 Ill. 439, 8 N. E. 62; Anderson v. S. 104 Ind. 472, 4 N. E. 63; S. v. Jones, 78 Mo. 282; Rider v. P. 110 Ill. 11.

[8] McElroy v. P. 202 Ill. 478, 66 N. E. 1058. Held error to refuse this instruction where another given for the prosecution stated that the jury might consider the fact, if it be a fact, that the defendant had been contradicted by other evidence.

[9] Bressler v. P. 117 Ill. 422, 441, 8 N. E. 62.

[10] S. v. Hossack, 116 Iowa, 194, 89 N. W. 1077; S. v. Sterrett, 71 Iowa, 386, 32 N. W. 387.

§ 374. **Defendant's failure to testify.**—While the statute of this state provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him.[11]

§ 375. **Demeanor and conduct of witness.**—You are the sole judges of the facts in this case, and of the credit to be given to the respective witnesses who have testified; and in passing on the credibility of the witnesses you have a right to take into consideration not only their testimony itself, but their conduct, demeanor and bearing while testifying on the witness stand, their objects, purposes or designs, if any have been shown by the evidence, in so testifying, their feelings of prejudice against the defendant, if any have been shown, and their means of knowing the facts and circumstances in proof, if any, tending to expose the feelings or purposes of such witness.[12]

§ 376. **Accomplices as witnesses.**—(1) The testimony of an accomplice is competent evidence, and the credibility of his testimony is for the jury to pass upon as they do upon that of any other witness; and while the testimony of an accomplice will sustain a verdict of guilty, though uncorroborated, yet his testimony must be received with great caution; but if his testimony carries conviction, and the jury are convinced of its truth, they should give it the same effect as would be allowed to a witness who is in no respect implicated in the offense charged.[13]

(2) It is competent to convict upon the uncorroborated testimony of an accomplice, if the jury, weighing the probability of his testimony, think him worthy of belief.[14]

(3) The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury; but great caution should be used in weighing such testimony, and the jury should not convict upon the testimony of an accomplice alone, unless his testimony is corroborated

[11] S. v. Ryno (Kas.), 74 Pac. 1116; (Indiana Statute,) see Thrawley v. S., 153 Ind. 375, 380, 55 N. E. 95.

[12] Bressler v. P. 117 Ill. 422, 441, 8 N. E. 62.

[13] Shiver v. S. 41 Fla. 630, 27 So. 39.

[14] Earll v. P. 73 Ill. 383; Johnson v. S., 65 Ind. 269.

by other evidence in some material point in issue, but such corroboration need not be as to everything to which the accomplice testifies.[15]

(4) Should you find from the evidence in this case that the prosecuting witness, D A, with whom the alleged incestuous intercourse is charged to have been had, did voluntarily, and with the same intent which actuated the defendant, or directly or indirectly consent to commit such act with him as alleged, then, in that event, she would be an accomplice, and her testimony would not be sufficient to warrant a conviction unless corroborated by other credible evidence tending to connect the defendant with the commission of the offense charged.[16]

(5) In determining the interest a witness has in the case you are at liberty to consider the fact, if the proof shows it, that such witness is under indictment for gaming, and that, if he testifies in behalf of the state, is hereby discharged from liability to fine or punishment on account of such violation. You have the right to look to this fact, if shown by the evidence, in determining what weight, if any, you will give to his testimony.[17]

(6) An accomplice is a competent witness, and the credibility and weight of his testimony is for the jury to pass upon and determine the same as they do the testimony of any other witness. The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the jury; and while the testimony of an accomplice will sustain a conviction, though uncorroborated, yet his testimony should be received and acted upon with great caution; but if his testimony carries conviction, and the jury are convinced of its truth, they should give it the same effect as would be allowed to any witness who is in no respect implicated in the offense charged.[18]

§ 377. Opinions of expert witnesses.—(1) The opinions of med-

[15] S. v. Greenburg, 59 Kas. 404, 53 Pac. 61. See Waters v. P. 172 Ill. 367 (extreme caution), 50 N. E. 148.

[16] Tate v. S. (Tex. Cv. App.), 77 S. W. 796.

[17] Howard v. S. (Miss.), 35 So. 653. Held proper under a statute releasing the witness from liability to fine or punishment for gaming in consideration that he will appear as a witness against his co-defendants.

[18] Shiver v. S. 41 Fla. 630, 27 So. 39; S. v. Greenburg, 59 Kas. 404, 53 Pac. 61; Earll v. P. 73 Ill. 333; Ayers v. S., 88 Ind. 275.

ical experts are to be considered by you in connection with all the other evidence in the case; but you are not bound to act upon such opinions to the entire exclusion of other evidence. Taking those opinions into consideration, and giving them just weight, you are to determine from the whole evidence taken together whether the accused was, or was not, of sound mind at the time in question, giving him the benefit of any reasonable doubt, if any such doubt arises from the evidence.[19]

(2) The opinions of medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon such opinions to the exclusion of all other evidence. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was, or was not of sound mind, yielding him the benefit of a reasonable doubt, if any such doubt arises.[20]

(3) The opinions of expert witnesses are to be considered by you in connection with all the other evidence in the case. You are not to act upon such opinions to the exclusion of other testimony. In determining the weight of the testimony of expert witnesses, you are to apply the same general rules that are applicable to the testimony of other witnesses. Taking into consideration the opinions of the expert witnesses, together with all the other evidence, you are to determine for yourselves, from the whole evidence, whether it establishes the guilt of the defendant beyond a reasonable doubt, as charged in the indictment.[21]

(4) You are not required to take for granted that the statements contained in the hypothetical questions which have been propounded to the witnesses are true. On the contrary, you should carefully scrutinize the evidence, and from it determine what, if any, of such statements are true, and what, if any, are not true. Should you find from the evidence that any of the material statements contained in the hypothetical questions are not correct, and that they are of such a character as to entirely destroy the reliability of the opinions based upon the hypothesis stated, you should attach no weight whatever to the opinions based thereon.

[19] Guetig v. S. 66 Ind. 106.
[20] Goodwin v. S. 96 Ind. 561.
[21] Epps v. S. 102 Ind. 553 1 N. E. 491.

You are to determine from all the evidence what are the real facts, and whether such hypothetical questions state them correctly or not.[22]

§ 378. **Detectives as witnesses.**—(1) That in weighing the testimony, greater care should be used by the jury in relation to the testimony of persons who are interested in or employed to find evidence against the accused than in other cases, because of the natural and unavoidable tendency and bias of the minds of such persons to construe everything as evidence against the accused, and disregard everything which does not tend to support their preconceived opinion of the matter in which they are engaged.[23]

(2) The police department is an important part of the machinery of our government, and it is well enough to bear in mind that your homes, your lives and your property would not be safe but for the police department and officers. It does not follow that because an officer testifies, that his testimony is to be discarded, or any suspicion cast upon it unless there is something about it which calls your attention to it.[24]

[22] Guetig v. S. 66 Ind. 107.

[23] Prenit v. P. 5 Neb. 377; Sandage v. S. 61 Neb. 240, 85 N. W. 35; Frudie v. S. (Neb.), 92 N. W. 320.

[24] P. v. Shoemaker, 131 Mich. 107, 90 N. W. 1035. (This instruction was held proper where an attack was made on the police officers).

CHAPTER XXIX.

CAUTIONARY INSTRUCTIONS IN CIVIL OR CRIMINAL CASES.

Sec.
379. Jury determine the facts.
380. Court determines the law.
381. Court construes writings.

§ 379. **The jury determine the facts.**—(1) In determining what facts are proved in this case the jury should carefully consider all the evidence before them, with all the circumstances of the transaction in question as detailed by the witnesses; and they may find any fact to be proved which they think may be rightfully and reasonably inferred from the evidence in the case, although there may be no direct evidence or testimony as to such fact.[1]

(2) In determining any of the questions of fact presented in this case, the jury should be governed solely by the evidence introduced before them. The jury have no right to indulge in conjectures or speculations not supported by the evidence.[2]

(3) The jury have been taken out to view the scene of this accident twice, the first time for the purpose of being able to understand the testimony, and the second time to witness certain experiments, by agreement of the parties. I charge you, that you are not to consider as evidence what you saw on the first view; but what you saw on the second view, that was shown to you by the

[1] North C. St. R. Co. v. Rodert, 203 Ill. 415; (held not objectionable in the use of the word "think" instead of believe.)

[2] Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711; (held error to refuse this instruction.)

parties under their agreement, you should take and consider as evidence in the case.[3]

(4) It is the duty of the jury to find the facts of this case from the evidence, and having done so, then to apply to such facts the law as stated in these instructions.[4]

(5) Neither by these instructions nor the special interrogatories, nor by any words uttered or remark made by the court during this trial, does, or did the court intimate, or mean to give, or wish to be understood as giving, an opinion as to what the proof is, or what it is not, or what the facts are in this case, or what are not the facts therein. It is solely and exclusively for the jury to find and determine the facts, and this they must do from the evidence, and having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are, and constitute, one connected body and series, and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole, and not detached or separated, any one instruction from any, or either, of the others.[5]

(6) In determining what facts have been proved in this case the jury should carefully consider all the evidence before them, with all the circumstances of the transaction as detailed by the witnesses; and they may find any material fact to have been proved, which they think may be rightfully and reasonably inferred from the evidence in the case, although there may be no direct evidence tending to establish such fact. But the jury have no right to indulge in mere conjecture or speculation not supported by evidence. It is the duty of the jury to find the facts from the evidence in the case before them, and, having done so, then to apply the law to such facts, as stated in these instructions. The court is not authorized to give or intimate an opinion as to what the evidence proves or does not prove, nor has the court intended, by any remark made during this trial, to give or intimate any opinion as to what the evidence proves

[3] Schweinfurth v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 227, 54 N. E. 89.

[4] North C. St. R. Co. v. Wellner, 206 Ill. 274, 69 N. E. 6; North C. St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849, (held not to be a direction to the jury to determine the facts independent of or without the aid of the law.)

[5] North C. St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849.

or does not prove, or what are, or what are not, the facts. The jury are solely and exclusively the judges of the facts of the case, and must determine them from the evidence introduced, and then apply the law as given in these instructions.[6]

§ 380. **Court determines the law.**—(1) In considering and deciding this case you should look to the evidence for the facts and to the instructions of the court for the law of the case, and find your verdict accordingly, without reference as to who is plaintiff or who is defendant.[7]

(2) In considering this case it is not only your duty to decide the case according to the weight of the evidence, but it is also your duty to decide it according to the law as given you by the court, applicable to the evidence. While it is true, as a matter of law, that the attorneys for the respective parties may state to you what they believe the law to be and base arguments thereon, still, under your oaths, and under the law, you have no right to consider anything as law except it be given you by the court, and you have no right to take the statement of any attorney as to what the law is, except the court gives you an instruction to the same effect; or in other words, you should consider only that as law which is given you by the court, and decide the case accordingly.[8]

(3) You are to try the question in the case submitted to you upon the testimony introduced upon the trial, and upon the law as given you by the court in these instructions. The court, however, has not attempted to embody all the law applicable to this case, in any one of these instructions, but in considering any one instruction you must construe it in the light of and in harmony with every other instruction given, and so considering and so construing, apply the principles in it enunciated to all the evidence in the case.[9]

(4) In considering and deciding this case you should look to the

[6] North C. St. R. Co. v. Rodert, 203 Ill. 415, 67 N. E. 812; Ramsey v. Burns, 27 Mont. 154, 69 Pac. 711; North C. St. R. Co. v. Wellner, 206 Ill. 274, 69 N. E. 6; North C. St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849.

[7] Cicero St. R. Co. v. Brown, 193 Ill. 277, 61 N. E. 1093.

[8] Vocke v. City of Chicago, 208 Ill. 194.

[9] Lampman v. Bruning, 120 Iowa, 167, 94 N. W. 562.

evidence for the facts and to the instructions of the court for the law of the case and find your verdict accordingly. You have no right to consider anything as law unless it be given you by the court.

(5) You have no right to take the statements of any attorney as to what the law is unless the court gives you an instruction to that effect. It is your duty to try this case upon the evidence introduced and the law given you by the court in these instructions. The court has not attempted, however, to embody all the law of the case in any one instruction. Therefore in construing any single instruction you must consider it in connection with all the other instructions given you, and construe them in harmony with each other.[10]

§ 381. **Court construes writings.**—The evidence upon this question, whether illegal stock was issued, is mainly record evidence, or written evidence, and under the law it is the duty of the court to construe such instruments, and to state the effect of such evidence, and it is the duty of the jury to receive and to accept the instructions so given; and this is so, even though you may think the instructions here given are wrong.[11]

[10] Cicero St. R. Co. v. Brown, 193 Ill. 277, 61 N. E. 1093; Vocke v. City of Chicago, 208 Ill. 194; Lampman v. Bruning, 120 Iowa 167, 94 N. W. 562; North C. St. R. Co. v. Kaspers, 186 Ill. 246, 57 N. E. 849.

[11] Merrill v. Reaver, 50 Iowa 417.

CHAPTER XXX.

BURDEN OF PROOF IN CIVIL CASES ONLY.

Sec.
382. Instructions for plaintiff—General.
383. Instructions for defendant—General.
384. Burden in specific cases.
385. Preponderance of evidence; number of witnesses.
386. Evidence equally balanced.
387. Preponderance in a case of negligence.

§ 382. Instructions for plaintiff—General.—(1) While the burden of proof is on the plaintiff to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, it would be sufficient for the jury to find in his favor.[1]

(2) If you find from the evidence that the plaintiff has proved his case as laid in his declaration, or in any count thereof, by a preponderance of the evidence, then you should find the defendant guilty.[2]

(3) If you believe from the evidence that the plaintiff has proved her case as laid in her declaration, or either count thereof, you will find the issues for the plaintiff.[3]

(4) If you find from the evidence that the plaintiff has made out her case by a preponderance of the evidence as laid in her declaration, or any single count thereof, then you should find for the plaintiff.[4]

[1] Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161; Donley v. Dougherty, 174 Ill. 582, 51 N. E. 714, See U. S. Brew. Co. v. Stoltenberg, 211 Ill. 585.

[2] Chicago & E. I. R. Co. v. Filler, 195 Ill. 17, 62 N. E. 919.

[3] Mt. Olive Coal Co. v. Rademacher, 190 Ill. 540, 60 N. E. 888; Pennsylvania Co. v. Marshall. 119 Ill. 404, 10 N. E. 220.

[4] North C. St. R. Co. v. Hutchinson, 191 Ill. 104, 60 N. E. 850 (held proper, though some of the counts had been dismissed, the court having given another in-

(5) While the burden is on the plaintiff to prove his case by a preponderance of the evidence, still, if the jury find that the evidence bearing upon the plaintiff's case preponderates in his favor, although but slightly, that would be sufficient to warrant the jury in finding in his favor. If you find from the evidence that the plaintiff has proved his case as laid in his declaration, or in any one of the counts thereof, by a preponderance of the evidence, then you should find the issues for the plaintiff.[5]

§ 383. **Instructions for defendant—General**—(1) The burden of proof is upon the plaintiff, and it is incumbent on her to establish her case by a preponderance of the evidence, and that unless you believe she has done so from all the evidence in the case, you will find for the defendant; and if you believe that the evidence in this case is equally balanced, then you will find for the defendant.[6]

(2) It is a requirement of the law that the plaintiff must make out and establish his case by a preponderance of the evidence, and unless he has done so in this case, then your verdict should be for the defendant.[7]

(3) The burden of proof is upon the plaintiff, and he cannot recover unless he proves to your satisfaction and by the greater weight of evidence each and every material fact of his case.[8]

(4) This is a civil suit, and is to be determined by a preponderance of the evidence. The burden of proof is upon the plaintiff, and to entitle him to a verdict in his favor he must have proved by a preponderance of the evidence all the material averments of some one of the three paragraphs of his complaint.[9]

(5) This being a civil suit, it is to be determined by a preponderance of the evidence. The burden of proof is upon the plain-

struction stating what counts had been dismissed.)

[5] Taylor v. Felsing, 164 Ill. 331, 45 N. E. 161; Chicago & E. I. R. Co. v. Filler, 195 Ill. 17, 62 N. E. 919; Mt. Olive Coal Co. v. Rodenmacher, 190 Ill. 540, 60 N. E. 888; Donley v. Dougherty, 174 Ill. 582, 51 N. E. 714; East v. Crow, 70 Ill. 92.

[6] Georgia P. R. Co. v. West, 66 Miss. 314, 6 So. 207.

[7] Tedens v. Schumers, 112 Ill. 268; Sievers v. Peters B. & L. Co. 151 Ind. 661, 50 N. E. 877, 52 N. E. 399.

[8] Doyle v. Mo. K. & T. T. Co. 140 Mo. 1, 41 S. W. 257. See San Antonio & A. P. R. Co. v. Waller, 27 Tex. Cv. App. 44, 65 S. W. 210.

[9] Leary v. Meier, 78 Ind. 397.

tiff to make out his case, and to entitle him to a verdict in his favor he must prove, by a preponderance of the evidence, all the material facts or averments of some one of the several paragraphs of his complaint, and unless you believe he has done so from all the evidence in the case then you will find the issue for the defendant; and if you believe that the evidence in the case is equally balanced, then you will find for the defendant.[10]

§ 384. Burden of proof in specific cases.—(1) The terms of the leasing of the plaintiff's farm to the defendant are material in this suit, and the plaintiff must prove to the satisfaction of the jury by a preponderance of the evidence that the terms of said leasing were such as the plaintiff claims the same to be; and if the jury shall find that the evidence preponderates in the slightest degree in favor of the defendant, or is equally balanced, then the law is for the defendant, and in such case the plaintiff cannot recover.[11]

(2) The note in question is prima facie evidence of indebtedness, and must be overcome by a preponderance of the evidence; and unless you believe from the evidence that the defendant has sustained his plea of set-off by a preponderance of the evidence, then you should find for the plaintiff as to that plea.[11*]

(3) The burden of proof is on the plaintiff to prove by a preponderance of the evidence that the note in controversy is the true, genuine note of said B., the deceased; that it was delivered to the plaintiff by said B., the deceased, in his lifetime; and if the plaintiff has failed to so prove, then it is your duty to find your verdict in favor of the defendant's estate and against the plaintiff.[12]

(4) The defendant must establish the existence of fraud by a preponderance of the evidence before you can find for him, for unless you are satisfied from the evidence that the defendant has clearly proved the existence of fraud in the lease

[10] Leary v. Meier, 78 Ind. 397; Georgia P. R. Co. N. West, 66 Miss. 314, 6 So. 207; East v. Crow, 70 Ill. 92.

[11] East v. Crow, 70 Ill. 92.

[11*] Laird v. Warren, 92 Ill. 208, (the preponderance of evidence is not required to be made up from testimony of the defendant alone); Indianapolis St. R. Co. v. Taylor, 158 Ind. 274.

[12] Gandy v. Bissell's Estate, (Neb.), 69 N. W. 634.

from H to P, the plaintiff, then you must find for the plaintiff.[13]

(5) Fraud is never to be presumed. The allegations of fraud in defendant's answer must be by him affirmatively established by the evidence, and will not be presumed from acts of the parties which may be accounted for on the basis of honesty and good faith.[14]

(6) Where the plaintiff proves, by a preponderance of the evidence, that certain sums of money have been paid to the defendant, and the defendant claims that said payment was made upon some other demand or account, which he claims he then held against plaintiff, the burden of proof is on the defendant to show by a preponderance of evidence that there then was a subsisting and unpaid debt due defendant from plaintiff upon which such payment was applied.[15]

§ 385. Preponderance of evidence; number of witnesses. (1) The burden of proof is upon the plaintiff to establish each and every particular fact necessary to make out his cause of action by a preponderance of the evidence. By the preponderance of the evidence is meant that greater and superior weight of the evidence which satisfies your minds. Preponderance is not alone determined by the number of witnesses testifying to a particular fact or state of facts. It may occur that the statements or superior knowledge of the subject matter testified to, of one or a few witnesses, may be of more importance and be relied upon with a greater degree of assurance than that of a greater number, and the testimony of the witnesses is oftentimes strenghtened or weakened by other facts and circumstances disclosed by the evidence.[16]

(2) By a preponderance of the evidence is not necessarily meant a greater number of witnesses, but if the plaintiff has proven the material allegations of her declaration by such evidence as satisfies and produces conviction in the minds of the jury, then she has proven her case by a preponderance of the evidence.[17]

[13] Prichard v. Hopkins, 52 Iowa 122, 2 N. W. 1028.

[14] Prichard v. Hopkins, 52 Iowa 122, 2 N. W. 1028.

[15] Prall v. Underwood, 79 Ill. App. 452.

[16] Ball v. Marquis (Iowa), 98 N. W. 497.

[17] Mayers v. Smith, 121 Ill. 451. 13 N. E. 216, (this instruction does not ignore the defendant's evidence.)

(3) The preponderance of the evidence is not necessarily determined alone by the number of witnesses testifying to any fact or facts, but in determining where the preponderance is, you may also take into consideration the opportunities or occasion of the witnesses for seeing or remembering what they testify to or about, the probability or improbability of its truth, the relation or connection, if any, between the witnesses and the parties, their interest or lack of interest in the result of the case, and their couduct and demeanor while testifying.[18]

(4) While the preponderance of the evidence does not consist in the greater number of witnesses testifying the one way or the other, yet the number of credible and disinterested witnesses testifying on the one side or the other of a disputed point is a proper element for the jury to consider in determining where lies the preponderance of the evidence.[19]

(5) The plaintiff holds the affirmative of the issue, or, what is called the burden of proof rests upon him, the defendant having denied the charges alleged against it in the declaration. The plaintiff must satisfy you by what is called a preponderance of the proof, that the wrong complained of was committed by the servant of the defendant, in manner and form as charged in the declaration. By a preponderance of proof, the court does not mean the largest number of witnesses on a given point; four or five witnesses may testify to a fact, and a single witness may testify to the contrary, but under such circumstances and in such manner and with such an air and appearance of truth and candor as to make it the more satisfactory or convincing to you that the one witness, with the opportunity of knowing the facts testified to, has told the truth of the matter. When you are thus satisfied that the truth lies with a single witness or any other number, you are justified in returning a verdict in accordance therewith. This is what is meant by a preponderance of proof. It is that character or measure of evidence which carries conviction to your minds.[20]

(6) By mentioning "the burden of proof" and "preponder-

[18] Myer v. Mead, 83 Ill. 20 (held not excluding from the jury the facts); Kansas City v. Bradbury, 45 Kas. 382, 25 Pac. 889; Illinois Steel Co. v. Wierzbicky, 206 Ill. 201, 68 N. E. 1101.

[19] West C. St. R. Co. v. Lieserowitz, 197 Ill. 612, 64 N. E. 718; St. Louis, &c. R. Co. v. Union, &c. Bank, 209 Illinois, 457, 460.

[20] North C. C. R. Co. v. Gastka, 27 Ill. App. 523.

ance of evidence" the court intends no reference to the number of witnesses testifying concerning any fact, or upon any issue in the case, but simply by way of expressing the rule of law, which is that, unless the evidence as to such issue appears in your judgment to preponderate, in respect to its credibility, in favor of the party to this action on whom the burden of proof as to such issue rests, then you should find against such party on said issue.[21]

(7) The jury are instructed that the fact that the number of witnesses testifying on one side is larger than the number testifying on the other side does not necessarily alone determine that the preponderance of the evidence is on the side for which the larger number testified. In order to determine that question the jury must be governed by and take into consideration the appearance and conduct of the witnesses while testifying; the apparent truthfulness of their testimony or the lack of it; their apparent intelligence or the lack of it; their opportunity of knowing or seeing the facts or subjects concerning which they have testified or the absence of such opportunity; their interest or the absence of interest in the result of the case; and from all these facts as shown by the evidence, and from all the other facts and circumstances so shown, the jury must decide on which side is the preponderance.

After fairly and impartially considering and weighing all the evidence in this case, as herein suggested, the jury are at liberty to decide that the preponderance of the evidence is on the side which, in their judgment, is sustained by the more intelligent, the better informed, the more credible and the more disinterested witnesses, whether these are the greater or the smaller number. But the jury have no right to capriciously disregard the testimony of the larger number of witnesses, nor to refuse to give whatever consideration, in their judgment, should be attached naturally to the fact that the larger number have testified one way. The element of numbers should be considered, with all the other elements already herein suggested, for whatever, in the judgment of the jury that element is worth, and the evidence of the smaller number of wit-

[21] O'Connell v. St. Louis, C. & W. R. Co. 106 Mo. 485, 17 S. W. 494.

nesses cannot be taken by the jury in preference to that of the larger number unless the jury can say, on their oaths, that, from all the facts and circumstances in the case, it is more reasonable, more truthful, more disinterested and more credible.[22]

(8) The burden of proof is upon the plaintiff to establish each and every particular fact necessary to make out his cause of action by a preponderance of the evidence. By the preponderance of the evidence is meant that greater and superior weight of the evidence which satisfies your minds. Preponderance is not determined alone by the number of witnesses testifying to a particular fact or state of facts, but if the plaintiff has proven all the material allegations of his declaration by such preponderance of the evidence as satisfies the jury and produces conviction in their minds then that is sufficient to entitle him to a verdict in his favor.

In determining the preponderance of the evidence, you must take into consideration, not alone the number of witnesses testifying to any fact or state of facts, or for the one side or the other, but you must also take into consideration the opportunities or occasion of the different witnesses for seeing, hearing, knowing or remembering what they have testified to or about, the probability or improbability of the truth of their statements, the relation or connection, if any has been shown, between any of the witnesses and the parties to the suit, their interest or lack of interest, if any, in the result of the suit, and their conduct and demeanor while testifying. Yet the number of credible and disinterested witnesses testifying to a material fact or state of facts in dispute, or for the one side or the other, is a proper matter for the jury to consider, together with all the evidence in the case, in determining where lies the preponderance of the evidence.

The jury have no right to capriciously disregard the testimony of the number of witnesses, nor to refuse to give whatever consideration, in their judgment, should be attached naturally to the fact that the larger number have testified one

[22] Gage v. Eddy, 179 Ill. 503, 53 N. E. 1008, (held to be a proper statement of the law where the opposing party called the larger number of witnesses.)

way and the smaller number the other. The testimony of the smaller number of witnesses cannot be taken by the jury in preference to that of the larger number, unless the jury can say, on their oaths, that from all the facts and circumstances in the case it is more reasonable, more trustworthy, truthful, disinterested and credible.[23]

§ 386. **Evidence equally balanced.**—If after considering all the evidence in the case you shall find that the evidence upon any question is equally balanced, you should answer such question against the party who has the burden of such issues, for in such case there would be no preponderance in favor of such proposition.[24]

§ 387. **Preponderance in a case of negligence.**—The burden of proof in this case is upon the plaintiff, and before he can recover on account of the alleged negligence on the part of the defendants in providing or having for use a weak, defective or insufficient plank as a scaffold, it is necessary for the plaintiff to prove, by a preponderance of the evidence, (1) that the plank was insufficient, weak or defective, and that the accident happened as the result of such weakness, insufficiency or defect; (2) that the defendants had notice or knowledge of such insufficiency, weakness or defect, or that they might have had notice thereof by the exercise of ordinary care; (3) that the plaintiff did not know of such insufficiency, weakness or defect, and that he had no means of knowledge thereof equal to those of the defendants; (4) and that he was, in his relation to the accident, in the exercise of ordinary care. If the plaintiff fails to prove, by a preponderance of the evidence, any one of these four propositions, the jury should find for the defendants, even though they find that Gallagher was foreman, and gave directions to use the plank in question.[25]

[23] Ball v. Marquis, (Iowa) 98 N. W. 497; Mayers v. Smith, 121 Ill. 451, 13 N. E. 216; Myer v. Mead, 83 Ill. 20; West C. St. R. Co. v. Leiserowitz, 197 Ill. 612, 64 N. E. 718; Gage v. Eddy, 179 Ill. 503, 53 N. E. 1008. See also, Wray v. Tindall, 45 Ind. 517.

[24] Renard v. Grande, 29 Ind. App. 579, 64 N. E. 644.

[25] Armour v. Brazeau, 191 Ill. 117, 126, 60 N. E. 904.

CHAPTER XXXI.

AGENCY.

Sec.

INSTRUCTIONS FOR PLAINTIFF.

388. Principal bound acts of agent.
389. Agent borrowing money for employer.
390. Company bound by acts of paying teller.
391. Agent exceeding authority; principal bound.
392. Railroad company bound by agents' negligence.

INSTRUCTIONS FOR DEFENDANT.

393. Agent acting without scope of authority.
394. Agent selling land at price agreed upon.
395. Contract on sale of machine by agent.

Instructions for Plaintiff.

§ 388. **Principal bound by acts of agent.**—(1) If you believe from the evidence that prior and up to the time of the execution of the bond sued on, the said F & H had voluntarily and knowingly held said M out to the world as authorized to sign contracts similar to the one in question, and had knowingly so conducted themselves to reasonably justify the public generally and those dealing with them, in believing that said M was authorized to sign their firm name to such contracts, and that the plaintiffs accepted said bond, believing that said M had authority to sign the same, then the defendants would be bound by the acts of said M.[1]

(2) If the defendant employed and authorized R to sell the land, and in pursuance of that authority R sold the land and induced the plaintiff to buy, and made false representations about the land, upon which the plaintiff relied and which induced

[1] Fore v. Hitson, 70 Tex. 520, 8 S. W. 292. See Smith v. Wise & Co. 58 Ill. 141, principal bound by acts of agent.

him to purchase, then the defendant would be responsible for such fraud, notwithstanding there were no instructions given to R by the defendant which authorized him to make fraudulent representations, and notwithstanding the defendant did not know that he practiced those fraudulent representations. Employing him as agent, or as his agent, to do that thing, he became responsible for the methods which his said agent adopted in doing that thing. If the representations were false in fact and R had no knowledge personally of the truth thereof, but derived his information from others as to those facts, he or the person for whom he was acting as agent in that business would be liable to an action for deceit.[2]

(3) If you find that A, the treasurer, had express authority to sign the notes and checks and effect the loan in question, or if you find that these acts were within the apparent scope of his authority, or within the scope of the authority which he was accustomed to exercise without objection by these defendants, your verdict should be for the plaintiff; but if you find that borrowing this money in the way testified to and giving this paper was not within the authority expressly given to him, or within the apparent scope of the authority which he was accustomed to exercise, then your verdict should be for the defendants; and if you find that this money borrowed, or received for the paper in suit, was not for the use of the defendants, and the plaintiff knew, or had good cause to know the fact, or if for any other reason the plaintiff did not in good faith trust the credit of the defendants, then your verdict should be for the defendants.[3]

(4) In bringing the action upon these notes the Globe Savings Bank and the plaintiff adopt and ratify all the acts of its agents or officers by which the notes in question came into the bank; that is, when the plaintiff seeks to recover upon these notes from the defendant, it is bound by what the evidence in the case shows to be the facts connected with the transaction.[4]

[2] Haskell v. Starbird, 152 Mass. 118, 25 N. E. 14.

[3] Rowland v. Apothecaries' Hall Co. 47 Conn. 387.

[4] Chicago, T. & T. Co. v. Brady, 165 Mo. 203, 65 S. W. 303.

§ 389. **Agent borrowing money for employer.**—(1) If you believe from the evidence that C borrowed money from plaintiff, claiming to act as agent of defendants, and if such act of borrowing was within the usual and ordinary scope or purview of the business in which C was employed, and which he was authorized by defendants to conduct and carry on, and plaintiff loaned the money to C for the benefit of defendants, then defendants would be bound for such money, even if, by the private contract between defendants and C, he was not authorized to borrow money, unless plaintiff knew he was not so authorized when he loaned the money.[5]

(2) If C borrowed money from plaintiff for the benefit of defendants, without authority from defendants, either express or implied, and if defendants, knowing that such money had been borrowed, ratified and acquiesced in the act of C, or knowing such money to be borrowed, accepted the benefit of it, then they would be held bound by the act of C, as much as if they had authorized it before it was done.[6]

(3) It is not necessary for plaintiff to show any express authority in C to borrow money to render defendant liable. If money was borrowed by C in the general course and conduct of the business of defendants, and defendants knew this fact and acquiesced in it, and the note sued on was given for money borrowed of plaintiff, by C, for the business of defendants, and the money was in good faith used in such business, and plaintiff had no knowledge of any want of express authority on C's part to borrow money, then you will find for the plaintiff.[7]

(4) If you find that C was an agent of defendants, but that express authority was not given to him, as such agent, to borrow money for defendants, then you may look to the contract between them as it may be shown, by the evidence, the nature and character of the business in which C was employed to act as agent, and all the transactions between them, and ascertain whether or not it is to be fairly implied as contemplated by them or embraced in the scope of his employment

[5] Collins v. Cooper, 65 Tex. 462.
[6] Collins v. Cooper, 65 Tex. 462.
[7] Collins v. Cooper, 65 Tex. 462.

as agreed on between them, that he should have such power to borrow money to be used in such business.[8]

§ 390. **Company bound by acts of paying teller.**—If you find from the evidence that the checks were certified by the paying teller of the defendant company, and if you further find from the evidence that said certifications were made in the general course of the defendant's business, and if you further find that plaintiff, in good faith, dealt with said defendant company on the basis of said course of business, and if you further find from the evidence that the officers of defendant knew of said course of business, then defendant will be bound by the act of its paying teller in making the certification of the check sued on.[9]

§ 391. **Agent exceeding authority—Principal bound.**—If the jury believe from the evidence that plaintiff authorized C, his agent, to rent the house in question to defendant for but one year, but that said agent rented it for two years, as alleged by the defendant's witnesses, and that the defendant held the same for two years, and that during the second year of the said tenancy plaintiff treated the defendant as his tenant by receiving the rent originally agreed upon, then the jury may infer that the landlord ratified the contract for the two years' lease and may find for the defendant.[10]

§ 392. **Railroad company bound by agent's negligence.**—A railroad company is liable for the acts of its employés or servants done in the prosecution of the company's business and within the scope of the authority given them as such employés. And so one of the important questions you are called upon to decide is whether the defendant, by its agents or employés, placed the hand-car that caused the injury on the highway. The true test is not the form of employment, whether by the day or by the month, but whether the men who left the car on the highway were under the control and direction of the defendant so that they were its servants, and not the servants of another.[11]

[8] Collins v. Cooper, 65 Tex. 462.
[9] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.
[10] Reynolds v. Davison, 34 Md. 666.
[11] Pittsburg, C. & St. L. R. Co. v. Sponier, 85 Ind. 169.

Instructions for Defendant.

§ 393. Agent acting without scope of authority.—(1) No statement made or action taken by defendant's agent and operator, B, before its office opened for business, and when said agent and operator was at home, or not in the service of the company or engaged in the functions of his position, was binding upon the defendant; nor can the defendant be held liable therefor, as the responsibility of the company began when the message was filed with it for transmission.[12]

(2) Unless you find from the evidence that J, the person whose name appears on the face of the writing introduced by the plaintiff, was authorized or held out to the public by the defendant company as being authorized to certify or mark "good," writings or checks of the character of the paper sued on by plaintiff, you will find for the defendant, and the court states to the jury that the fact that the said J signed himself as the "teller," or was designated or called "teller" or "paying teller" of the defendant company, is not of itself sufficient to justify the conclusion that the said J was clothed with any such authority.[13]

(3) Even if the jury believe from the evidence that S did purchase the property in controversy for himself and L & M, yet if the jury believe from the evidence that L did not authorize him to do so, L is not bound by such purchase. If the jury find that in the contract and arrangement which resulted in the giving of the note in suit, the business between L and B was done by S, and that said S had no authority, as a general agent, from said L beyond that resulting from their relation as general partners in the manufacture of plows, but only an authority to do that particular business, he, the said S, would be, as far as this case is concerned, a special agent for L in that business, and so far as the jury find that the said S, in doing it, exceeded the authority and instructions given to him by L, L would not be bound.[14]

(4) If you find from the evidence that D was a canvassing

[12] Hargrave v. Western U. Tel. Co. (Tex. Cv. App.), 60 S. W. 689.

[13] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.

[14] Lytle v. Boyer, 33 Ohio St. 510.

agent, obtaining subscriptions for the plaintiff for books published by him and sold by subscription, and that said D was restricted by the terms of his employment from collecting for any books or parts of books, except such as were delivered by him, and if you further find that the said canvassing agent never had possession of the parts and works for which this suit is brought, and did not deliver the same to the defendant, then the court declares the law to be that the employment of D, as canvassing agent, gave him no authority to collect the money for which this suit is brought, and it devolves upon the defendant to show that D had such authority.[15]

§ 394. **Agent selling land at price agreed upon.**—If you shall find from the evidence that J, as agent of the plaintiff, agreed with the defendants that they should take and sell for the plaintiff certain of the lots then being offered for sale by the plaintiff for a certain and definite price fixed, and agreed upon by and between the defendants and the said J, for which the defendants were to take and receive an agreed commission, viz.: one and one-half per cent on the purchase price, and that the defendants have sold said lots for the agreed price, and have fully accounted to the plaintiff for the proceeds received therefor, less the stipulated commission, then they are not liable to the plaintiff in this action, although they may have received from the purchasers of said lots a sum for conducting the negotiations, receiving and paying out the notes and money, and superintending the transactions, and receiving the deeds and other papers for them.[16]

§ 395. **Contract in sale of machine by agent.**—If you find from the evidence in this case that the defendant, Kemp, at the time of their first conversation concerning the purchase of the machine, told the plaintiff's agent, Minnick, that any contract that Cook might make with the plaintiff through its agent would be all right with him, and used such language as would reasonably give the plaintiff to understand that he would stand by such agreements or contracts relative to the purchase of such machine, then the plaintiff would be justified in dealing

[15] Chambers v. Short, 79 Mo. 206.

[16] Alexander v. Northwestern C. U. 57 Ind. 466.

with him (Kemp) by and through Cook, and the acts and contracts, if any, made by him for himself and Kemp, would bind Kemp. Any orders or directions by Kemp to Cook would not affect the plaintiff until such time as it (the plaintiff) had notice or knowledge. If Kemp authorized Cook to act for him, and the plaintiff had knowledge of it, then he could have withdrawn such authority by notifying the plaintiff of his desire to do so, but not by giving Cook alone the notice to that effect. Cook could not bind Kemp without authority from Kemp.[17]

[17] Bell City Mfg. Co. v. Kemp, 27 Wash. 111, 67 Pac. 580, (held not commenting upon the facts—not intimating what the facts were.)

CHAPTER XXXII.

CONTRACTS IN GENERAL.

Sec.

INSTRUCTIONS FOR THE PLAINTIFF.

396. Party completing contract can recover.
397. Preventing completion of contract.
398. Damages for failure to perform contract.

INSTRUCTIONS FOR THE DEFENDANT.

399. Party failing to complete contract.
400. Damages for failure to deliver property sold.
401. Joint or several liability on contract.

Sec.

RESCINDING CONTRACT.

402. Contract, rescinding without express words.
403. Contract void, if made by insane person.

SETTLEMENT OF DISPUTED CLAIMS.

404. Consideration of settlement, when sufficient.

CLAIMS WITHOUT CONSIDERATION.

405. Claim based upon void patent.

Instructions for Plaintiff.

§ **396. Party completing contract can recover.**—(1) The execution of the written instruments in suit is admitted, and if you find from the evidence that the railroad in question was built and completed from A to K, and the cars running thereon to the depot at K, within two years from the first day of June, 1875, then the plaintiff is entitled to recover the full amount named in said instruments, with interest thereon at the rate of ten per cent per annum from the time the road was thus completed to the present time, unless you find that the de-

fendant has maintained his defense of failure of consideration as hereinafter explained, by a preponderance of testimony.[1]

(2) If you believe from the evidence that the plaintiffs entered upon the performance of their part of the said contract, and performed work under it, according to its terms, and if you further find that the engineer made out monthly proximate estimates of the work done by plaintiff at the end of each month, which were returned and brought to the notice of the defendant, and that the defendant, upon the request of the plaintiffs, after the expiration of fifteen days from the return of any such estimate, refused and neglected to pay plaintiffs the amount due according to any such estimate, such failure or refusal of the defendant to pay was a breach of his part of the contract, and the plaintiffs were not bound to go on and complete all the work, but might suspend or quit the work until payment was made, and if you find that payment has not been made and the work has been suspended, the plaintiffs will be entitled to recover in this suit for all work done under said contract at the rates therein stipulated.[2]

§ 397. **Preventing completion of contract.**—(1) Where two parties enter into a lawful contract upon sufficient consideration, and one of the parties is ready and willing to perform, and makes preparations to perform on his part, but is prevented from performing by the other party, the party so ready and willing to perform can recover all damages suffered by him by reason of the default of the other party, including necessary expenses incurred in making such preparation.[3]

(2) Under the contract it was not the duty of the plaintiffs to procure the right of way; and if you find from the evidence that the plaintiffs entered upon the performance of their part of the contract by grubbing, clearing, grading, etc., as therein stipulated, and that they were prevented from completing their part of the contract because the right of way had not been obtained from the owners of the land through which the road ran, and where the work was to be done, who forbade and refused to permit the plaintiffs to enter and do the work, this would be a sufficient

[1] Merrill v. Reaver, 50 Iowa, 404.
[2] Bean v. Miller, 69 Mo. 393.
[3] Kenwood Bridge Co. v. Dunderdate, 50 Ill. App. 581.

excuse for the failure of the plaintiffs to perform the work, where such right of way had not been obtained.[4]

(3) The defendant was bound by the contract to furnish one track scales at the one-bark. The plaintiffs claim that the defendant failed and refused to furnish such track scales, and that by reason thereof they were damaged five hundred dollars, and they claim that they demanded such scales under the contract of the defendant. If the defendant failed and refused to furnish such scales, and the plaintiffs were damaged thereby, they will be entitled to recover such damages as they have sustained, if they have sustained any on this account.[5]

(4) If the jury should find from the evidence that the plaintiff was wrongfully discharged, it was nevertheless the duty of the plaintiff not to remain idle, but to use every reasonable effort to procure employment, and the jury should deduct from such amount of salary as they find to have been unpaid such sums as the plaintiff earned in any other employment, and also any further sums which, in their judgment, he might have earned by due and reasonable industry and diligence.[6]

(5) If the jury believe from the evidence that the defendant made with the plaintiff the agreement in either count of the plaintiff's declaration alleged, and that before the time for execution of the same on his part, by his own act put it out of his power to perform said agreement, then he is liable to the plaintiff in this suit for such damages as the plaintiff has sustained by any failure on the part of the defendant to perform, and in such case it was unnecessary for the plaintiff to make demand, or to do any other act to fix the defendant's liability.[7]

§ 398. **Damages for failure to perform contract.**—The party who has been wrongfully deprived of the gains and profits of an executory contract may recover as an equivalent, and by way of damages, the difference between the contract price—the amount which he would have earned and been entitled to recover on performance—and the amount which it would have cost him to perform the contract. In estimating such costs, allowance must be made for every item of cost and expense

[4] Bean v. Miller, 69 Mo. 393.
[5] Eaves v. Cherokee Iron Co. 73 Ga. 459.
[6] Equitable E. A. v. Fisher, 71 Md. 436, 18 Atl. 808.
[7] White v. Thomas, 39 Ill. 227.

necessarily attending a full compliance on his part; and in estimating his profits, you will, of course, exclude all such as are merely speculative and conjectural.[8]

Instructions for Defendant.

§ 399. **Party failing to complete contract.**—(1) That under the written contract in evidence the defendant was entitled to have erected such a dock as was called for by the terms of the contract, and even though the jury may believe that there has been a substantial performance of the terms of the contract by the plaintiffs, yet nevertheless, if the jury believe that the terms have not been fully complied with, the jury should allow to the defendant such sum or sums as, from the evidence, they may believe are reasonable and proper to enable the defendant to complete the dock in the manner stipulated for in the contract.[9]

(2) If you find from the evidence that the plaintiff contracted to perform a certain job of work in making a road for a stipulated price, and that he, the plaintiff, did not complete said job, but without cause abandoned the same before it was completed according to contract, without the consent of the defendant, and that it would cost more to complete said job, according to the contract, than the original contract price, the plaintiff cannot recover for the work done by him.[10]

§ 400. **Damages for failure to deliver property sold.**—If the jury believe from the evidence that in the winter of 1865 the defendant sold to the plaintiff, and the plaintiff purchased of the defendant, the best sixty head of a lot of seventy head of cattle the defendant was then feeding, to be delivered to the plaintiff at any time between the first and fifth of March, 1865, at the option of the plaintiff, the plaintiff, on such delivery, to pay therefor six cents per pound of the gross weight of the same, and that the defendant, in February, 1865, sold and delivered to another person forty-eight head of said seventy

[8] Cincinnati, &c. R. Co. v. Lutes, 112 Ind. 281, 11 N. E. 784, 14 N. E. 706.

[9] Keeler v. Herr, 157 Ill. 57, 59, 41 N. E. 750.

[10] Swift v. Williams, 2 Ind. 366

head of cattle, and put it out of his power to comply with his agreement of sale to the plaintiff, then he is liable to the plaintiff in this action for the difference between such contract price and what said sixty head of cattle were worth at the time and place, when and where, by said agreement, they were to be delivered by the defendant to the plaintiff, and it makes no difference whether the price of the cattle rose or fell after the time the cattle were to be delivered under the contract.[11]

§ 401. **Joint or several liability on contract.**—If some of the defendants employed the plaintiff by a contract, express or implied, and some of them did not so employ him, and did not afterwards accept and enjoy the fruits and benefits of his services, if such services were rendered by the plaintiff, then as to such defendants who did not so employ the plaintiff, and who did not accept and enjoy the fruits of such services, you should find for such defendants, even though the plaintiff should be entitled to recover against others.[12]

Rescinding Contract.

§ 402. **Contract, rescinding without express words.**—Any contract may be rescinded by consent of all the contracting parties, and such consent need not necessarily be expressed in words.[13]

§ 403. **Contract void if made by insane person.**—The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; but if the defendant was, at the time of signing the notes, so insane or destitute of reason as not to know the consequences of the act, then it is void. If he did know what he was doing, and understood the consequences of his contract, then he is liable, and your verdict should be for the plaintiffs in case you so find.[14]

[11] White v. Thomas, 39 Ill. 227; Garfield v. Huls, 54 Ill. 427, damages for failure to do work properly.

[12] Hauss v. Niblack, 80 Ind. 414.

[13] Iroquois Furnace Co. v. Bignall H. Co. 201 Ill. 299, 66 N. E. 237.

[14] Van Patton v. Beals, 46 Iowa, 62.

Settlement of Disputed Claims.

§ 404. Consideration of settlement, when sufficient.—(1) A person cannot pay and satisfy a debt by the payment of a less sum than the debt, but if you believe from the evidence that the plaintiff, in order to avoid a suit, of the result of which he was doubtful, agreed to receive a sum in full satisfaction of the amount claimed to be due on said account, and upon such agreement the defendant paid the sum agreed upon, then such agreement and payment would completely discharge the defendant of all liability.[15]

(2) The abandonment and discontinuance of a suit or action brought to enforce a doubtful right or claim, is a sufficient consideration for a promise, and so is the compromise of a disputed claim made bona fide, even though it ultimately appears that the claim compromised was wholly unfounded. If, therefore, you should believe and find from the evidence that the note sued on in this case was given in consideration of a compromise of the suit instituted by plaintiffs on the five thousand dollar note, and that said suit was dismissed by plaintiffs, and that said agreement of compromise was carried out by the parties thereto, then you are instructed that said agreement forms a sufficient consideration for the note sued on.[16]

(3) If you believe from the evidence that the parties to this action compromised their differences, as set forth in the plaintiff's declaration, and that the writing of April 27, 1897, marked exhibit No. 6, was signed by the plaintiff after being prepared and written by the defendant's agent, and that said writing embodied the actual terms of such compromise, and was accepted and acted upon by the defendant, then the defendant is bound by the provisions of said compromise.[17]

(4) If these two men made an unfounded claim (they claim here this lumber was not according to contract), and made that

[15] Ogbom v. Hoffman, 52 Ind. 439.

[16] Hunter, E. & Co. v. Lanius, 82 Tex. 677, 18 S. W. 201, (part payment of the amount actually due is not satisfaction of the whole debt, even though the creditor agrees to receive a part for the whole of his claim and gives a receipt for the amount in full; there must be a consideration before such settlement is binding). Ostrander v. Scott, 161 Ill. 345, 43 N. E. 1089.

[17] Rhodes v. Chesapeake & O. R. Co. 49 W. Va. 494, 55 L. R. A. 170, 175.

knowingly, knowing there was no color of right to it, but asserted an unjust claim, and induced the parties to compromise, under the circumstances, in order to avoid litigation, etc., it would not be binding on the company here; but, if these two men did find fault with the lumber, and had good reason for finding fault, if it did not comply with the contract, and they talked about it, and they finally made this offer in good faith, and these parties said, "We will take the money," and took it, they are bound by the contract, because, in that case, there would be a valid dispute between the parties, settled up by agreement. On the other hand, if it were a fraudulent scheme on the part of these parties to beat defendant out of money, it would not be binding.[18]

(5) If the jury find that the parties met and this matter was all settled up, and was so understood by the parties, each party presenting a claim against the other, and the pretended settlement was not a myth, but a reality, that constitutes a good defense to this action, and the verdict must be for the defendants.[19]

(6) If you believe from the evidence that from time to time the officers or agents of the plaintiff and defendant in this suit met and looked over their accounts together and settled all matters between them, and struck a balance and agreed upon that as the amount due from the one to the other, then, in the absence of a mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the amount so agreed upon.[20]

(7) When the parties have gone to law about a matter they may settle between themselves with the intervention of an attorney on either side, or with an attorney on one side, if they see fit to do so, but after an action is commenced, and the parties appear with an attorney in court, any settlement of the claim out of court, without the knowledge or consent of the attorney, is to be viewed with suspicion. If there is any fraud in the case, such a settlement may be set aside.[21]

[18] Nash v. Manistee Lumber Co. 75 Mich. 357, 42 N. W. 840.

[19] Doyle v. Donnelly, 56 Me. 28.

[20] Gottfried Brewing Co. v. Szarkowski, 79 Ill. App. 583.

[21] Falconio v. Larsen, 31 Ore. 149, 48 Pac. 703.

(8) If you find that the plaintiff performed certain legal services for the defendant, with the defendant's knowledge and consent, and that defendant recived the benefits thereof without objection, then plaintiff will be entitled to recover the reasonable value of such services, unless defendant has established by a fair preponderance of the evidence that they were performed under a contract made by him with plaintiff's father, by which the latter agreed that plaintiff should perform the said services, and the value thereof should be indorsed upon an indebtedness which was then owing by H to the defendant, and that the plaintiff had knowledge of such agreement.[22]

(9) No particular form of words is necessary to constitute a settlement, nor is it necessary to prove a promise to pay the balance found to be due, provided a balance be found in favor of the party.[23]

Claim without Consideration.

§ **405. Claim based on void patent.**—(1) The jury are instructed that the letters patent are prima facie evidence that the plaintiffs are the joint inventors of the so-called improved composition, yet, if that fact may be disproved, and if the jury should be satisfied from the testimony that said composition was invented by the plaintiff K alone, and not by K and E jointly, the letters patent are void; there was no consideration for the note sued on, and the verdict must be for the defendants.[24]

(2) The inventor should confine his specifications to substances which he knows will answer the purpose for which they are used; that the specification accompanying the letters patent read in evidence makes use of the general term water; and, if the jury believe from the evidence, that the waters of the territory of Colorado in general use will not accomplish the end for which water is used in the said composition, either by reason of alkaline properties or otherwise, then the specification is not sufficient and the letters are void; there was no considera-

[22] Hudspeth v. Yetzer, 78 Iowa, 13, 42 N. W. 529.

[23] Brewer v. Wright, 25 Neb. 805, 41 N. W. 159.

[24] Keith v. Hobbs, 69 Mo. 87.

tion for the note sued on, and the verdict must be for the defendants.[25]

(3) The specification accompanying the letters patent read in evidence must in and of itself contain a full, clear and exact description of the invention, and if the object of the alleged patent improved composition for tanning cannot be obtained when the specification is clearly followed out by competent workmen of ordinary skill and proficiency in the art of tanning, without invention or addition of their own, or if, in order to attain the object of the patent, information must be derived from other sources than the specification, as by experiments, or from using other ingredients to make the thing described, or if it requires the solution of a problem, then, and in either of said cases, the letters patent are void, and the note sued on is without consideration and the jury must find for the defendants.[26]

[25] Keith v. Hobbs, 69 Mo. 87.
[26] Keith v. Hobbs, 69 Mo. 88.
*When a contract is made to be performed at a certain place, but at no definite time, the law implies that it is to be performed within a reasonable time; Sanborn v. Benedict, 78 Ill. 309, 313 (form).

CHAPTER XXXIII.

CONTRACTS—SALE OF PERSONAL PROPERTY.

Sec.
406. Sale complete on delivery.
407. Sale of goods by sample.
408. Sale on warranty—Breach.
409. Implied warranty.
410. Burden of proving warranty.
411. Damages for breach of warranty.
412. Conditions of sale complied with.
413. Rescinding sale for defects.
414. Purchasing with intent to defraud.

§ 406. **Sale complete on delivery.**—(1) All that is necessary to pass property is that the buyer and seller agree. If one who has a long course of dealing with another have a correspondence in regard to certain specific property, nearer to the purchaser than to the seller, and, more properly, by reason of their business relations, in the control of the purchaser, and they agree, one to buy and the other to sell, the sale is complete just as soon as they agree, and the seller charges the buyer, and the buyer credits their respective books with the price of the property.[1]

(2) If, after a full consideration of all the evidence before you, you shall find that there was a delivery of the goods in question, and that such delivery was absolute and unconditional, and was by the parties so intended, then the property vested in the plaintiff, and he should be entitled to recover.[2]

(3) If you should find that there was a delivery to the plaintiff of the goods in question, but that such delivery was coupled

[1] Robinson v. Uhl, 6 Neb. 332.

[2] Albright v. Brown, 23 Neb. 141, 36 N. W. 297.

with the condition that the property should not pass until the purchase price was paid, and if you further find that the purchase price as agreed upon was not paid, and that defendants repossessed themselves of the property, then the conditions are not complied with on the part of the purchaser, and if the seller has done all he agreed to do on his part the seller has a right to repossess himself of the property, and such repossession is a rescinding of the sale, and defendants would be entitled to recover.[3]

(4) It is a rule of law that a sale and a delivery of goods, on condition that the property is not to vest until the purchase money is paid or secured, does not pass the title to the purchaser until the condition is performed; and the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both as against the vendee or one purchasing from such vendee with notice. When goods are delivered to the vendee, the intention of the parties determines the interpretation to be given to the delivery.[4]

(5) It is a general rule of law that when goods are sold, on condition ot payment being made, or some other condition precedent being performed, before or on delivery, then an absolute and unconditional delivery of the goods, without requiring at the time of delivery payment or performance, would be a waiver of such payment or performance as a condition precedent, and a complete title would pass to the purchaser, provided, that at the time of such delivery it was the intent of the parties that it should be absolute and unconditional delivery. Though it is important, it is not absolutely imperative that the vendor declare that he does not waive any condition of the sale at the time of a delivery to the vendee. The situation of the parties, the nature of the transaction, the presumption of honest dealing, and like considerations may be taken into account in determining whether any conditions of the sale have been waived.[5]

§ 407. Sale of goods by sample.—(1) In a sale of goods by sample, the vendor warrants the quality of the bulk to equal

[3] Albright v. Brown, 23 Neb. 141, 36 N. W. 297.

[4] Albright v. Brown, 23 Neb. 140 36 N. W. 297.

[5] Albright v. Brown, 23 Neb. 140, 36 N. W. 297.

that of the sample. In such sale, there is also an implied condition that the buyer shall have a fair opportunity to compare the bulk with the sample. It must not be assumed, however, that in all cases where a sample is exhibited, the sale is a sale by sample, for the vendor may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk.[6]

(2) If the jury believe from the evidence that the plaintiff intended by exhibition of the samples to the defendant, taken in connection with all he said and did at the time the alleged contract of sale was made, to impress the defendant with the belief that he was selling by sample, and that the defendant believed he was purchasing by the sample so exhibited, then they must find for the defendant, unless they further believe from the evidence that the bulk did correspond in quality with the sample, or that the defendant has, by clear and unequivocal acts, accepted the peanuts after knowledge that the bulk did not correspond in quality with the sample.[7]

(3) If the jury believe from all the evidence in this case that the sale of the peanuts by S to the defendant was made by a sample, exhibited at the time of such sale, and that upon an inspection and comparison of the bulk of said peanuts with such sample, made by the defendant or his agent within a reasonable time after their delivery, it was ascertained that the bulk of such peanuts were inferior in quality to and did not correspond with such sample, and that the plaintiffs had notice thereof within a reasonable time, then they must find for the defendant, unless the jury believe further from the evidence that after the peanuts purchased by the defendant of the plaintiffs were received and inspected by the defendant or his agent, and the sample exhibited at the time of the sale compared with the bulk, that the defendant personally or by his agent exercised any act of ownership over them, or did any act amounting to an acceptance of them. The said acceptance is a waiver of any objection to their quality, and the failure of their quality will not afterwards avail him as a defense, except in case of fraud; but the proof of

[6] Proctor v. Spratley, 78 Va. 255. See Gutta P. & R. Mfg. Co. v. Wood, 84 Mich. 459, 48 N. W. 28.

[7] Proctor v. Spratley, 78 Va. 257.

such acceptance must be clear and unequivocal, and not founded upon or induced by a mistake as to the facts at the time of such reception by the agent, and it is a question for the jury whether, under all the circumstances, the acts which the buyer or his agent does or forbears to do amount to an acceptance.[8]

§ 408. **Sale on warranty—Breach of warranty.**—(1) The burden of proof, in this case, is upon the defendants to establish any warranty by the plaintiff respecting the quality of machinery sold by the plaintiff to the defendants.[9]

(2) It is not necessary that a representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain; but only that it should be made during the course of the dealing which leads to the bargain, and should then enter into the bargain as a part of it.[10]

(3) The burden of proof, in this case, is upon the defendants to establish any warranty by the plaintiff respecting the quality of the machinery sold by the plaintiff to the defendants. It is not necessary, however, that the warranty should be simultaneous with the conclusion of the bargain; but only that it should be made during the course of dealing which leads to the bargain and should then enter into the bargain as a part of it.[11]

(4) If you believe from the evidence that the defendant, Thorne, represented to the plaintiff, Raymond, that the hams in question were first class hams, equal in quality to any brand of hams made in the market, and that such representation was made by Thorne with the intention thereby of warranting the hams to be of such quality, and to induce the plaintiff to buy the same, and that Reynolds purchased said hams relying upon such representations as a warranty of the quality, and that at the time of purchasing the hams, they were not of the quality represented, but were of a poor, inferior and bad quality, then your verdict will be for the plaintiffs. And, upon the question of damages, the court instructs you that if you believe, from the evidence, that they, at the time of such sale to the plaintiffs,

[8] Proctor v. Spratley, 78 Va. 256.

[9] Adler v. Robert Portner Brewing Co. 65 Md. 28, 2 Atl. 918.

[10] Eureka Fertilizer Co. v. Baltimore Copper, Smelt and Roll Co. 78 Md. 183, 27 Atl. 1035.

[11] Adler v. Robert Portner Brewing Co. 65 Md. 28, 2 Atl. 918; Eureka Fertilizer Co. v. Baltimore, C. S. &c. R. Co. 78 Md. 183, 27 Atl. 1035.

had a contract for the resale of said hams to one Davis, of Salt Lake City, and that they had sold the same as hams of the quality aforesaid, and that, at the time of the sale to the plaintiffs, the defendant, Thorne, had knowledge of such contract of resale, and knew that the plaintiffs purchased said hams to fulfill said contract of resale, and that the hams were shipped to said Davis before the plaintiffs had any notice of their quality, and that upon their arrival at Salt Lake City the said Davis refused to receive or pay for the same, for the reason that they were not, at the time of their shipment to him, of the quality he had bargained for, then you will award to the plaintiffs as damages such sums of money as you may belive, from the evidence, the plaintiffs had sold said hams to said Davis for, less such sum, as you may believe from the evidence, said hams were actually worth at the time of their purchase by the plaintiffs; and you will further allow the plaintiffs such sum of money, if any, as you may believe from the evidence they were obliged to pay out on account of the transportation of said hams to said Salt Lake City at the time of their sale to the plaintiffs.[12]

(5) If the jury believe that the plaintiff sold to the defendant the barge mentioned in the evidence, for which the notes sued on were given, and as inducement to the defendant to make said purchase, represented that said barge was all right, and was in condition for service at once, and that the defendant, relying on said representations, agreed to purchase and did actually purchase and accept the same, and gave the said notes for the purchase money; and shall further believe that said barge was not all right and in condition for service at once, but, on the contrary, was unsound and unseaworthy, and in consequence of such unsoundness was, together with a valuable cargo, lost and damaged, then the defendant is entitled to recoup against plaintiff's claim on said notes the amount of damage (if any) sustained as a direct consequence of said breach of warranty.[13]

§ **409. Implied warranty.**—(1) An implied warranty is not

[12] Thorne v. McVeagh, 75 Ill. 81, 83.

[13] Eureka Fertilizer Co. v. Baltimore Copper, S. & R. Co. 78 Md. 183, 27 Atl. 1035.

that the article or thing sold shall be the best of its kind, or such as might have been represented at the time of the sale, but only that such article or thing shall be reasonably suitable for the purpose for which it was inteded to be used.[14]

(2) When one sells articles of personal property, he impliedly warrants that it is merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects undiscovered. "Latent defects" means such defects as are hidden. The implied warranty, however, does not cover defects which can be discovered by ordinary prudence and caution. As to these, the law presumes the buyer to exercise his own judgment. If you believe that the consideration of the note sued on was a lot of horses, that they were not at the time of the sale merchantable and reasonably suited to the use intended, and that they were so because of defects which were not discoverable by ordinary prudence, this would be a good defense to the note. If the evidence shows that the consideration of the note failed entirely, this would altogether defeat a recovery. If there was a partial failure, there should be an apportionment between the parties, according to the facts of the case.[15]

(3) An implied warranty is not that the article or thing sold shall be the best of its kind, or such as might have been represented at the time of the sale, but only such article or thing shall be reasonably suitable for the purposes for which it was intended to be used.

When one sells articles of personal property he impliedly warrants the same to be merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects undiscovered—that is, such defects as are hidden. The implied warranty, however, does not cover defects which can be discovered by ordinary prudence and caution. In such case the law presumes that the buyer exercises his own judgment in making the purchase.[16]

(4) A purchaser of property has no right to rely upon the representations of the vendor or seller of the property as to the

[14] Hodge & W. v. Tufts, 115 Ala. 370, 22 So. 422.

[15] Hoffman v. Oates, 77 Ga. 703.

[16] Hodge & W. v. Tufts, 115 Ala. 370, 22 So. 422; Hoffman v. Oates, 77 Ga. 703.

quality where he has reasonable opportunity of examining the property and judging for himself as to its qualities.[17]

§ 410. **Burden of proving warranty.**—(1) The burden of showing that the oats delivered by the defendant were not the kind which he contracted to deliver is upon the plaintiff, and unless he has satisfied the minds of the jury, by the evidence adduced, that the oats delivered were not the kind or variety so agreed to be delivered, then they must find for the defendant.[18]

(2) In so far as the defendant relies upon a warranty of quality of the property sold and a breach of the same, the burden of proving the warranty is upon the defendant; and unless it has proved both the warranty and the breach alleged by a preponderance of the evidence, it will not be entitled to any benefit therefrom in the suit.[19]

§ 411. **Damages for breach of warranty.**—(1) In ascertaining the extent of the damages suffered by the defendants, if any, the jury must look to all the evidence to determine what it would reasonably cost to put the apparatus in a condition reasonably suitable for the manufacture and dispensing of soda water beverages; and if the only evidence on that point is that it would not cost over one hundred dollars, then that is the only abatement the defendants would be entitled to, and the plaintiff would be entitled to a verdict for the balance of notes and interest.[20]

(2) Even if the jury should find from the evidence that the apparatus was not suitably fitted for the purpose for which it was sold, then the measure of defendant's damage is the amount necessary to repair the apparatus as it may be shown to be defective.[21]

(3) If the evidence reasonably satisfies the jury that the apparatus as a whole was costly and expensive, and was only defective in some minor respects, and they further believe from the evidence that such defects could be remedied and put in such condition as would make the apparatus reasonably suit-

[17] Shepard v. Goben, 142 Ind. 322, 39 N. E. 506.
[18] Gachet v. Warren, 72 Ala. 291.
[19] Tacoma Coal Co. v. Bradley, 2 Wash. 606, 27 Pac. 454.
[20] Hoge & W. v. Tufts, 115 Ala. 372, 22 So. 422.
[21] Hodge & W. v. Tufts, 115 Ala. 370, 22 So. 422.

able for the purposes intended, then the costs of putting the same in such condition would be the measure of defendant's damages.[22]

(4) If you find for the plaintiff, you will award plaintiff as damages the difference between what you believe from the evidence to be the actual value of the goods described in the declaration at the time of the sale, and what you believe from the evidence their value would have been, if they had been as represented in the warranty made by the defendant.[23]

§ 412. Conditions of sale complied with.—(1) If it appears from the greater weight of the evidence that the plaintiff constructed the apparatus in question in a good, workmanlike manner, and that, by the tests made of said apparatus by plaintiff and defendant, the same complied with all the terms of plaintiff's guaranty, then and in that event the plaintiff would be entitled to recover the contract price.[24]

(2) If the jury believe that the contract between the parties was that the defendant was to deliver to the plaintiff one hundred and fifty tons of iron as soon as he could get it from the railroad company, and was to receive twenty-eight dollars per ton therefor, and that he did offer to deliver to the plaintiff so much of said iron as he, the said defendant, received from said company, and as soon as he so received it, and that the plaintiff, after accepting a part of said iron, refused to receive any more, then they are to find for the defendant.[25]

(3) If the jury believe from the evidence that nothing was agreed upon between the parties about the time for the delivery of the iron, but that the plaintiff, or his agent, was informed by the defendant, at or about the time the said contract was agreed on, that he, the defendant, was to get the iron from the railroad company, and that he was dependent upon such company as to when it would be delivered, and further believe that the defendant did, as soon as he received any of the iron from the said company, offer to deliver it to the said plaintiff, who, after receiving a part, refused to accept any more, then they are to find for the defendant.[26]

[22] Hodge & W. v. Tufts, 115 Ala. 371, 22 So. 422.

[23] Ferguson v. Hosier, 58 Ind. 438.

[24] Smith v. Independent School Dist. 112 Iowa, 38, 83 N. W. 810.

[25] Smith v. Snyder, 77 Va. 440.

[26] Smith v. Snyder, 77 Va. 440.

§ 413. Rescinding sale for defects.—(1) A defrauded vendee has the right, within a reasonable time after the knowledge of fraud, to rescind the contract, unless he has with such knowledge affirmed the sale by express words or unequivocal acts, or, while he is deliberating, an innocent third party has acquired an interest in the property.[27]

(2) The defendants cannot rescind the contract on the ground that the apparatus shipped them was not new, and had been used by others prior to the sale, if they, after being informed by letter or otherwise that said apparatus had been used by other persons in the year 1887, continued to use the same.[28]

(3) If defendants knew of all the defects complained of in March or April, 1888, and with this knowledge kept and used the same until midsummer of that year or later, and paid their notes given for the purchase money until November, 1888, this would be, as a matter of law, a waiver of their right to rescind the contract.[29]

(4) If the jury believe from the evidence that defendants kept and used the soda fountain and apparatus for three or more months after they had knowledge of all the alleged defects and fraud complained of, they should find for the plaintiff at least the amount of debt proven, less the value of repairing said defects.[30]

(5) If the evidence shows that the defendants claimed in July, 1888, that they had rejected the apparatus and held it subject to the order of plaintiffs, and then continued to make monthly payments until November or December, that was evidence tending to show that the claims or defects were unfounded.[31]

(6) If the jury find from the evidence that defendants, after the receipt of this belting by them, had an opportunity to inspect and examine and determine by such examination and inspection the quality of the belting they received, and if defects could have been ascertained by examination and inspection thereof, and without doing so they voluntarily paid their bill,

[27] Proctor v. Spratley, 78 Va. 257.
[28] Hodge & W. v. Tufts, 115 Ala. 371, 22 So. 422.
[29] Hodge & W. v. Tufts, 115 Ala. 371, 22 So. 422.
[30] Hodge & Williams v. Tufts, 115 Ala. 371, 22 So. 422.
[31] Hodge & W. v. Tufts, 115 Ala. 371, 22 So. 422.

then they cannot have set off the amount they paid at that time.[32]

(7) If the jury find that the contract offered in evidence was entered into between the plaintiff and defendant, and that the plaintiff was ready and willing and did offer to deliver, during the period of time covered by said contract, coal daily, in quantities and of the quality contemplated by the contract, and that after receiving, consuming and paying for a portion of the coal embraced in said contract, the master of machinery and the master of transportation of the defendant rejected said coal as not satisfactory to them, and that said rejection was not bona fide, and that the defendant setting up such rejection as an excuse thereafter refused to receive the balance of said coal from the plaintiff, then the plaintiff is entitled to recover.[33]

§ 414. Purchasing with intent to defraud.—In considering the question as to whether or not S bought the goods with the intention and purpose of defrauding the plaintiff—you are told that there are in law certain matters which are sometimes termed "badges of fraud," that is, matters which, if shown, are usually considered as evidence tending to show fraud. Among these are unusual or extraordinary methods of conducting business, if shown. Any secrecy or concealment in said business, if shown, or any other unusual methods or acts connected with the transaction in question, if shown by the evidence, are proper to be considered when deciding whether fraud, in fact, existed in connection with the transaction. As applied to this case, if S, by his acts prior to or at the time of the sale, intentionally induced plaintiff to believe that he intended to pay for the goods, and said S, in fact, did not intend to pay therefor, and the said S induced this belief intending to deceive the plaintiff and induce him to sell the goods to him, and the plaintiff was thereby deceived, and was induced by this misrepresentation to make the sales, and would not have made them if defendant had not made this misrepresentation, then the debt was created by fraud of said S, and

[32] Gutta P. & R. Mfg. Co. v. Wood, 84 Mich. 459, 48 N. W. 28.

[33] Baltimore & O. R. Co. v. Brydon, 65 Md. 200, 3 Atl. 306, 9 Atl. 126.

the plaintiff would be entitled to recover, provided you find that said S. was at the time of the sale insolvent.[34]

[34] Phelps D. & P. Co. v. Samson, 113 Iowa, 150. 84 N. W. 1051.

*For forms of instructions held good on the sale of grain in storage, by transfer of warehouse receipts, see: Cole v. Tyng, 24 Ill. 100.

CHAPTER XXXIV.

CONTRACTS—PROMISSORY NOTES.

Sec.
415. Holder of note may recover, when.
416. Holder of note, when cannot recover.
417. Transferring note by endorsement.
418. Interest on note—Usury.
419. Suit to recover value of lost note.

§ 415. Holder may recover on note, when.—(1) In the absence of evidence, the holder of a promissory note indorsed by the person to whose order it is made payable is presumed to be a holder in good faith, and entitled to recover. Such presumption may be rebutted or overcome by evidence from which the jury believe either that the note was transferred by the payee after due, or that the party to whom it was transferred took it with notice of the defense thereto.[1]

(2) If under all the circumstances you find the plaintiff acquired and holds the note by purchase in good faith in the usual course of trade for a valuable consideration before due, without notice of such infirmatives, your verdict will be in his favor for fifty dollars with six per cent. interest to date. Add together the sum so found, that is, the interest and principal, and the whole amount will be his damages.[2]

(3) Even though you may believe from the evidence that the note in controversy was given to Dines by Hall for the sole purpose of using it as collateral in securing a loan for a smaller

[1] Mahaska County S. Bank v. Crist, 87 Iowa, 418, 54 N. W. 450. Under the laws of Indiana only notes payable at a designated bank in the state come within the rule here laid down, Hardy v. Brier, 91 Ind. 91.

[2] Kitchen v. Loudenback, 48 Ohio St. 177, 26 N. E. 979.

amount, if you also believe from the evidence that the plaintiff purchased said note from Dines before its maturity for a valuable consideration, you must find your verdict for the plaintiff, unless you shall further believe from the evidence that, at the time the plaintiff purchased said note, it had notice or knowledge of the circumstances and conditions under which Dines secured and held said note.[3]

(4) If you believe from the evidence that the plaintiff purchased the note in controversy for value before maturity, you must find your verdict for the plaintiff, even though you may believe from the evidence that Dines had no right or authority to sell the note, unless you shall further believe from the evidence that at the time the plaintiff purchased said note, it had notice or knowledge that Dines had no right or authority to sell the note.[4]

(5) In order to defeat a recovery by the plaintiff bank, it is incumbent on the defendants to establish by a preponderance of the evidence, first, the truth of the defense which they have pleaded against the note in suit; and, second, the fact that the bank purchased the note with notice of such defense, or that it made such purchase after the note became due. If both these propositions have been so established, then the plaintiff cannot recover; but, if either proposition has not been so established, then plaintiff will be entitled to your verdict for the full amount of the note in suit.[5]

(6) If the defendant's testator, having been discharged from the liability as surety upon the note sued on in this action with full knowledge and understanding of his release as surety, promised the holder or payee to pay said note if the principal did not, he thereby revived his liability as surety, and such subsequent promise was binding without any new consideration to support it.[6]

(7) Even if the defendant was an indorser of the note, and not a maker, and if no notice of the nonpayment of the note was given him within the time required to make him liable, if he subsequently, with knowledge of the fact that such notice had not been given, promised to pay or "fix it up," or any equiv-

[3] Wright Investment Co. v. Friscoe Realty Co. (Mo.), 77 S. W. 296.

[4] Wright Investment Co. v. Friscoe Realty Co. (Mo.), 77 S. W. 296.

[5] Mahaska County S. Bank v. Crist, 87 Iowa, 419, 54 N. W. 450.

[6] Bramble v. Ward, 40 Ohio St. 267.

alent words, meaning thereby to arrange for its payment, this would be a waiver of the want of notice, and he would be liable as though the notice had been duly given.[7]

(8) If you find—to make it more specific—that when this note was drawn and signed by S there was no understanding and agreement on the part of H with the other defendants that he was to sign the note with them, and that the payee did not accept the note as signed, but merely took it into his possession temporarily in order to procure the other signers, and that he did not turn over this personal property to S until after all the others had signed it, then your verdict should be for the plaintiff.[8]

(9) If the jury shall find from the evidence that the said notary did use reasonable diligence to ascertain the residence or place of business of the makers of said note as set out in its first instruction, but did not use reasonable diligence to ascertain the dwelling or place of business of the defendant, that then the notice deposited in the postoffice, as aforesaid, is not sufficient to hold the defendant, and the plaintiffs are not entitled to recover, unless the jury shall further find from the evidence that the notice so deposited in the postoffice, as aforesaid, did actually reach the defendant on that or the succeeding day; or unless they shall find from the evidence that subsequently to the day of the protest of said note, said defendant promised the plaintiffs or their attorney to pay the amount of said note, with a knowledge of the fact that notice of nonpayment had not been regularly given to him.[9]

(10) The burden of proof is upon the defendant in this case, and unless the jury believe from the evidence that the defendant has established, by a preponderance of the evidence, his allegation in the answer that said notes (or some of them) were given for the accommodation of said bank (as explained in other instructions), then your verdict should be for the plaintiff as to all of the notes sued upon in this case.[10]

(11) The notes involved in this suit being joint notes executed by several persons, and one of the names thereon having been forged, would be void as to the person whose name was forged,

[7] Cook v. Brown, 62 Mich. 477, 29 N. W. 46.

[8] Steers v. Holmes, 79 Mich. 434, 44 N. W. 922.

[9] Staylor v. Ball, 24 Md. 190.

[10] Chicago T. & T. Co. v. Brady, 165 Mo. 201, 65 S. W. 303.

but valid as to the others, unless at the time the plaintiff accepted the notes she had knowledge of the forging, or in some way participated in the fraud of wrongfully obtaining the said signature; but if you find from the evidence the plaintiff received and accepted said notes in good faith and without any knowledge or information that any of the signatures were not genuine, being innocent of any wrong, the law protects her, and you should find for the plaintiff against those who did sign the notes.[11]

(12) Although the witness, T, delivered the note in suit to witness, Y, in violation of the instruction of defendants, and although he communicated his instructions to witness, Y, at the time of such delivery, yet, if the jury find and believe from the evidence that after said delivery, and after having knowledge that H had not signed said note, defendants approved and adopted as their own the act of said T in making said delivery to said Y, the verdict should be for the plaintiff.[12]

(13) It would make no difference with the liability of B, as the maker of the note, that it was not signed by him at the time it was originally made by C. His liability would be the same if he subsequently signed it and sold and delivered it to the plaintiff for a valuable consideration, as if he had signed it when first made.[13]

(14) If you find from the evidence that the plaintiff bank received the note in good faith and before it was due, as a collateral security for a loan made to S & W, and that said loan is still unpaid, then plaintiff will be entitled to a verdict; that is, the holder of a note as collateral security for the payment of a loan made at the time the collateral security is deposited, is to be treated as a purchaser, and if he receives such collateral in good faith, and before due, he holds it free from the defenses to which it would be liable in the hands of original holders to the same extent.[14]

[11] Helms v. Wayne Agr. Co. 73 Ind. 327. Citing: Stoner v. Millikin, 85 Ill. 218; Selser v. Brock, 3 Ohio St. 302; Franklin Bank v. Stevens, 39 Me. 532; Craig v. Hobbs, 44 Ind. 363; York County M. F. Ins. Co. v. Brooks, 51 Me. 506.

[12] Hurt v. Ford (Mo.), 36 S. W. 673.

[13] Cook v. Brown, 62 Mich. 478, 29 N. W. 46.

[14] Mahaska County S. Bank v. Crist, 87 Iowa, 419, 54 N. W. 450.

(15) Under the pleadings and evidence, the defendant has admitted the execution of all the notes sued upon by plaintiff in this case, and has admitted that plaintiff is the legal owner and holder of said notes. It is, therefore, the duty of the jury to find for the plaintiff as to each or all of said notes, unless the jury believe from the evidence that some one or more of said notes was obtained by the bank as a matter of accommodation, as explained in other instructions.[15]

(16) A note to settle an embezzlement or a shortage of an agent is valid and good, if it was given to settle the indebtedness or shortage, and if there is no agreement to stifle the prosecution for the embezzlement.[16]

(17) The legal effect of the deed of trust (which has been read in evidence), and the said notes recited in said deed, is to indicate a transaction in which B issued the said notes as part payment of the purchase price of certain land. The jury are further instructed that by his answer in this case defendant admits that the title to the land (described in the deed of trust) was conveyed to defendant before said deed of trust was executed by defendant. The court instructs you that the right to possession of said land, which defendant acquired by the admitted conveyance of title to him by S, was, if so intended by him and the officers of the bank with whom he had the transaction, a valuable consideration for the notes mentioned in the deed of trust and sued upon in this case.[17]

(18) The plaintiff in this case has sued on a note alleged to have been executed by the defendants to W and C, payable at the Vincennes National Bank and endorsed to the plaintiff. The defendant by his answer admits the execution and endorsement of the note. This admission makes out the plaintiff's side of the case and entitles him to a verdict for the full amount of the note and interest, unless the defendant has satisfied you by a preponderance of the evidence that the material allegations of the amended second paragraph of his answer so far as the burden of proof rests upon him, are true.[18]

(19) The plaintiff has sued upon six different notes, each of

[15] Chicago T. & T. Co v. Brady, 165 Mo. 201, 65 S. W. 303.

[16] Wolf v. Troxell, 94 Mich. 575, 54 N. W. 383.

[17] Chicago T. & T. Co. v. Brady, 165 Mo. 197, 65 S. W. 303.

[18] Zook v. Simonson, 72 Ind. 88.

which constitutes a separate and distinct claim or cause of action in plaintiff's petition. Those claimed are called "counts" in the instructions to you by the court. Your verdict should state your finding or decision as to each count or cause of action separately. And if your finding is for the plaintiff, as to any one or more counts, you should also state in your verdict the exact amount which you find from the evidence to be still due and unpaid at the present time (including principal and interest to date) on each particular note mentioned in the count or counts of the petition on which you may so decide to find for plaintiff.[19]

§ 416. Holder of note cannot recover, when.—(1) As between the party accommodated and the party accommodating, the latter can be under no liability to the former whatever by the relation which they are placed upon the paper; and in this case, if you find from the evidence that B was, in fact, an accommodation maker of the paper sued on, then he cannot be held liable—no matter in what form the transaction was put.[20]

(2) If you believe from the evidence that the promissory note read and shown in evidence was made by the defendant, M, and indorsed by the defendant, A, and delivered by him to his co-defendant, M, for the purpose of enabling M, the maker of the note, to raise money thereon for his own use; and if you further believe from the evidence that after the defendant, A, had so indorsed and delivered the note to the said M, the words and figures "with interest at ten per cent. per annum after maturity," now appearing in said note, were written therein without the knowledge, consent or authority of the defendant, A, by the said M or by an agent or clerk of his, whether done in the presence of any officer or agent of the plaintiff or not, and whether with or without the knowledge of the plaintiff, the verdict should be for the defendant, A.[21]

(3) It is claimed by the defendant, B, that after he signed a note similar in all respects to the one sued on, excepting that the written words "with interest at ten per cent" were not then

[19] Chicago T. & T. Co. v. Brady, 165 Mo. 200, 65 S. W. 303.

[20] Chicago T. & T. Co. v. Brady, 165 Mo. 202, 65 S. W. 303.

[21] Capital Bank v. Armstrong, 62 Mo. 62.

in the note, and since he signed it, without his knowledge or consent, the said printed words were stricken out and the said written words inserted. If such an alteration of the note were made by any holder of the note, or made with the knowledge of any holder of the note, without the knowledge of B, it would be a material alteration, and would release him from all liability on the note, and if the defendant, B, proves this fact by a fair preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether A, the plaintiff, was or was not the owner of the note at the time of the alteration, if he made the alteration after B, the defendant, signed it.[22]

(4) Where an accommodation note is diverted from the purpose for which it was given, one who takes it with knowledge cannot recover from the accommodation party; and in this case, the receiver possesses, as a matter of law, all the knowledge that the G S bank possessed upon the subject of this note.[23]

(5) If you believe from the evidence before you that the promissory note in controversy was never delivered by B in his lifetime, nor by the duly appointed executor of his estate after his death, then it is your duty to find your verdict in favor of the said B estate, the defendant, and against G, the plaintiff.[24]

(6) If the jury believe from the evidence in this case that J indorsed his name on the back of the note sued on in this case as indorser and not as joint maker thereof, and that at the time said note was delivered to the plaintiff he knew the said J indorsed the said note as an indorser thereon, and not as a joint promisor, and that the said plaintiff had said note regularly protested and had notice sent to the said J as indorser of such protest, then the jury may consider said facts, along with the other evidence in the case, and that if therefrom they believe from the evidence that the said J was an indorser on the note sued on, and not a joint maker, or promisor, they should find for the defendant.[25]

(7) The defendant in his answer alleges, in substance, that W

[22] Brooks v. Allen, 62 Ind. 405.
[23] Chicago T. & T. Co. v. Brady, 165 Mo. 203, 65 S. W. 303.
[24] Gandy v. Bissell's Estate (Neb.), 69 N. W. 633.
[25] Roanok Grocery & M. Co. v. Watkins, 41 W. Va. 793, 24 S. E. 612.

and C made an agreement with him by which they undertook to graft the defendant's apple trees with grafts that would grow and bear a good quality of fruit, and do the work in a skillful manner; that the grafting was done in an unskillful manner to the injury of the plaintiff's trees and with worthless grafts; that the note was given in consideration of said undertaking, and the plaintiff had knowledge of these facts when he took the assignment of said note. It is not incumbent on the defendant to prove that the plaintiffs had knowledge, when the note was indorsed to them, of the other matters alleged in the said paragraph. Upon proof of these matters the burden of proof would rest on plaintiffs to show that they took the note in ignorance of the existence of those matters.[26]

(8) If you find from the evidence that B signed the notes sued on in this case as an accommodation maker for the G S bank, and delivered them to the bank or one of its officers for the bank, he cannot be held liable thereon, no matter how the bank may have dealt with the notes, so long as it retained ownership and control thereof; and even though you find that the bank, after the notes were delivered to it, gave S the benefit of the whole or a part of the benefit thereof, this fact would not render B, the defendant, liable on the notes. And in this connection you are instructed that the possession of the receiver is the possession of the bank.[27]

(9) As between the maker and the payee of a promissory note, oral evidence touching the consideration thereof may be considered by you, and if you find from the evidence that the defendant, B, received no consideration for the signing of the notes sued on, and that the same were made for the accommodation of the G S bank, then your verdict should be for the defendant.[28]

(10) The burden of proof is on the plaintiff to show that the note was given upon a valuable consideration, and, if that is doubtful upon the whole evidence, he could not recover; that proof of the execution of the note and its production in evidence made a prima facie case for the plaintiff, upon which

[26] Zook v. Simonson, 72 Ind. 88.
[27] Chicago T. & T. Co. v. Brady, 165 Mo. 203, 65 S. W. 303.
[28] Chicago T. & T. Co. v. Brady, 165 Mo. 202, 65 S. W. 303.

they might find a verdict for him, unless the defendant introduced evidence which shows either that it was not given for a valuable consideration, or that the consideration had failed, or evidence to render it doubtful in their minds whether it was given on a valuable consideration; and, that if not so given, or if it is doubtful whether it was given for a valuable consideration, either for want of consideration or for failure of consideration, the plaintiff could not recover.[29]

(11) If you are satisfied from the evidence that the note in question was given for seed wheat, at fifteen dollars per bushel, and that such seed wheat proved worthless as such, then your verdict would be in favor of the defendant, provided you further find that the plaintiff had notice of the worthless character of the wheat and of such consideration, or had such notice as to put him on inquiry, and he failed to inquire solely for the reason that he did not want to know the consideration.[30]

(12) If the defendant intended the note to be a gift to the plaintiff, it was given without any legal consideration therefor, although the plaintiff may have supposed the note to be in payment for a prior indebtedness, unless the defendant by his words or conduct gave the plaintiff reasonable cause to believe, and the plaintiff was thereby led to believe, that the note was given in settlement of her claim against the estate of the wife for services, or of some claim in controversy between the plaintiff and the defendant.[31]

§ 417. Transferring note by endorsement.—(1) Where one party, for a full and valuable consideration, agrees to give or transfer or let another have a promissory note, the law implies that the transfer is to be made by endorsement, unless a different agreement is made by the parties.[32]

(2) And, where the agreement for the transfer is shown, and a valuable consideration therefor, the party claiming that the transfer was to be by delivery or by endorsement, without recourse or otherwise than by simple endorsement, has on him the burden of so proving.[33]

[29] Burnham v. Allen, 1 Gray (Mass.) 497.

[30] Kitchen v. Loudenbeck, 48 Ohio St. 177.

[31] Nye v. Chace, 139 Mass. 380.

[32] Wade v. Guppinger, 60 Ind. 378.

[33] Wade v. Guppinger, 60 Ind 378.

(3) Where a note has been endorsed in blank, the holder of the same may fill the blank with the name of the endorsee; that the endorsement of the note is said to be in blank when the name of the endorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the endorsee, or of any subsequent holder; and that in such case, while the endorsement continues blank, the note may be passed by mere delivery, and the endorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable at his pleasure to himself or to another person.[34]

§ 418. Interest on note—Usury.—(1) If the jury believe from the evidence that more than ten percent interest per annum has been paid by the defendants to the plaintiff, the law presumes that such amount, exceeding ten percent per annum, if proven, is a payment on the principal of the note, unless explained by the evidence.[35]

(2) That under the issues in this case, if the jury believe from the evidence that the defendant, Crabtree, borrowed of the plaintiff the sum of four hundred and fifty dollars, on or about January first, 1858, for which said Crabtree gave the note sued on, with the defendant, Woods, the said Woods being, in fact, only security on said note, and that, at the time the said money was borrowed, the plaintiff and defendant, Crabtree, agreed that Crabtree should pay, besides the interest mentioned in the note, interest at the rate of six percent per annum in addition, the said additional interest was and is usury, and against the statute of the state. And if, from the evidence in the case, the jury believe that said Crabtree has paid interest on said note at the rate of sixteen percent per annum, then under the law of this state, the plaintiff cannot recover any interest whatever on the principal of the said note, and whatever payments the evidence in the case may show the defendant has paid on said note as interest, must be allowed on the principal of the said note, and, if the sum actually paid, according to the evidence, amounts to more than the sum of four hundred and

[34] Palmer v. Marshall, 60 Ill. 292. [35] Reinback v. Crabtree, 77 Ill. 182, 187.

fifty dollars, then the defendants are entitled to a verdict in this case.[36]

§ **419. Suit to recover value of lost note.**—If the jury believe from the evidence that the plaintiff gave to the defendants, and the defendants received from the plaintiff, the promissory note in question for collection, for a compensation or reward therefor to be paid by the plaintiff to the defendants, and that the defendants or other persons to whom they intrusted it for collection lost it by carelessness, then the plaintiff is entitled to recover the value of the note; and that the value, in the absence of evidence to the contrary, is the amount of the note; and that, if the plaintiff is entitled to recover the value of the note, she is also entitled to interest on that value from the time the note became due to the date of the verdict; and that, if the jury believe from the evidence that the defendants, or those to whom they intrusted it lost it, and it is not shown under what circumstances it was lost, it is presumed that it was lost by carelessness.[37]

[36] Reinback v. Crabtree, 77 Ill. 182, 185.

[37] American Ex. Co. v. Parsons, 44 Ill. 314, (held not erroneous as suggesting a legal conclusion of carelessness.)

CHAPTER XXXV.

CONTRACTS RELATING TO INSURANCE.

Sec.

LIFE INSURANCE.

420. False statements in application avoids policy.
421. The right to avoid policy may be waived.
422. Manner or mode of giving notice of death.
423. Formal proof of death unnecessary, when.
424. Assignment of policy without authority of beneficiary.

Sec.

FIRE INSURANCE.

425. Property not destroyed by fire —No recovery.
426. Holder of policy not responsible for agent's acts.
427. Fraud in proof of loss defeats recovery.
428. Abandonment of insured boat, when justifiable.
429. Boat not in safe and seaworthy condition defeats recovery.

Life Insurance.

§ 420. **False statements in application avoids policy.**—(1) A misrepresentation or false statement made in his application for insurance by the person whose life is insured, respecting a material fact, avoids the policy issued upon such application, and this, whether the misrepresentation was made innocently or designedly. If, therefore, the jury believe from the evidence that S, the insured, in his application for the policy or certificate here sued on, stated that he had no serious illness, or stated that he had not had during the last seven years any disease or severe sickness, and that either of those statements was false in any respect, and are deemed by the jury to be material, then, whether S, the insured, intended to deceive or not, the said policy or certificate is void, and the jury should find for the

defendant, unless they further believe that the avoidance of the policy or certificate has been waived by the defendant.[1]

(2) If you shall find from the evidence that on the thirtieth day of November, M, the insured, had consumption, you must find a verdict for the defendant, and it makes no difference whether he knew he was thus afflicted or not. He may have been entirely ignorant of the fact, or may have believed that the symptoms he had did not indicate consumption. Yet if, in fact, he had consumption at that time, you must find for the defendant.[2]

(3) The contract between the insurance company and the insured is like a contract between two individuals. If one makes a false statement as to facts, material to the settlement of the terms upon which the contract shall be made, which are exclusively within his knowledge, and thereby induces the other to agree to terms which he might not otherwise have assented to, the party deceived cannot be held liable upon the contract.[3]

(4) If you find that on the thirtieth day of November, 1894, the date of the policy, or when it was delivered to the plaintiff, Mrs. H was not in a state of sound health, you must find for the defendant.[4]

(5) Sound health, as used with reference to life insurance, means that state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously and not a mere indisposition which does not tend to weaken or undermine the constitution of the assured. The word serious is not generally used to signify a dangerous condition, but rather a grave or weighty trouble.[5]

§ **421. The right to avoid policy may be waived.**—There can be no waiver of the avoidance of a policy by reason of material false statements or misrepresentations in the application, unless the acts relied upon as showing the waiver were done with full knowledge of the facts. While, therefore, the receipt of premiums or assessments with full knowledge on the part of the

[1] Schwarzbach v. Ohio &c. Union 25 W. Va. 640.

[2] Mutual B. L. Ins. Co. v. Miller, 39 Ind. 483.

[3] Mutual B. L. Ins. Co. v. Miller, 39 Ind. 483.

[4] Metropolitan L. Ins. Co. v. Howle, 62 Ohio St. 206 (held error to refuse this instruction under the wording of the policy), 56 N. E. 908.

[5] Metropolitan L. Ins. Co. v. Howle, 62 Ohio St. 207, 56 N. E. 908.

defendant of facts working a forfeiture of the policy, might constitute a waiver of such forfeiture, yet the receipt of such premiums or assessments in ignorance of such facts would not constitute a waiver.[6]

§ 422. **Manner or mode of giving notice of death.**—(1) A substantial compliance with the conditions of the policy of insurance, as to the manner and mode of giving notice of the death of the insured to the defendant, is all that can be required on the part of the plaintiff in giving such notice. No particular form of notice is required.[7]

(2) Under the policy of insurance in this case no particular form of notice was required; and that if the jury believe from the evidence that the letter written on August 24, 1884, was intended by the plaintiff to give the required notice to the company, and that upon receipt of said letter the company sent its agent to the city of R, the place of the death of the insured, for the purpose of investigating the facts and circumstances connected with the said death, and that such investigation was made immediately thereafter, then no further proof could be required in this case before the suit was brought.[8]

(3) One of the conditions of the policy is that "immediate notice of any accidental injury or accidental death for which claim is to be made under this contract shall be given in writing to the secretary of the company at P, with full particulars of the accident and injury, and unless affirmative and positive proof of death or injury, and that the same resulted from bodily injuries covered by this contract, shall be furnished to the company within six months of the happening of such accident, in case of such injuries resulting fatally, then all claims based thereon shall be forfeited to the company."[9]

(4) If the jury believe from the evidence that O was a general agent of the defendant for the purpose of effecting policies of insurance and adjusting losses, and if they further believe from the evidence that the said agent declined to pay the policy upon the sole ground that the insured was intoxicated at the time of

[6] Schwarzbach v. Ohio V. P. Union, 25 W. Va. 640.

[7] Travelers' Ins. Co. v. Harvey, 82 Va. 951, 5 S. E. 553.

[8] Travelers' Ins. Co. v. Harvey, 82 Va. 951, 5 S. E. 553.

[9] Braymer v. Commercial M. A. Co. 199 Pa. St. 259, 48 Atl. 972.

the accident, or that he so acted as to warrant the plaintiff in believing that the payment by the company would be resisted upon that ground, then the plaintiff had the right to institute this suit, although ninety days had not expired from the death of the insured.[10]

§ 423. **Formal proof of death unnecessary, when.**—The court instructs the jury that if they believe from the evidence that the plaintiff wrote to the insurance company the letter dated August 21, 1884, giving notice of the death of B, the insured, and, that after receipt of said letter, and in consequence thereof, the company sent its agent, C, to inquire and ascertain all the facts in reference to said death, and that the said agent came to R, the place of said death, and investigated the facts as to the death and the cause thereof, and that after making such investigation, the said agent, upon the sole ground of intoxication at the time of the accident, told the plaintiff "that he had no case, and that in his opinion the company ought not to pay and would not pay the policy," and that such denial of liability was not because the formal proofs of the death had not been given, then it was not incumbent on the plaintiff to furnish any further proof of said death, and the plaintiff had the right at any time thereafter to institute this suit.[11]

§ 424. **Assignment of policy without authority of beneficiary.** The policy of insurance being payable to M vested in her alone the absolute ownership of it, and it could not be assigned or transferred to C or any other person by her husband or any other person without her authority; and an assignment or delivery of the policy to C by the husband of the defendant without her authority would not bind her in any respect.[12]

Fire Insurance.

§ 425. **Property not destroyed by fire—No recovery.**—(1) The court instructs the jury that the plaintiffs under the pleadings

[10] Travelers' Ins. Co. v. Harvey, 82 Va. 952, 5 S. E. 553.

[11] Travelers' Ins. Co. v. Harvey, 82 Va. 950, 5 S. E. 553.

[12] Pence v. Makepeace, 65 Ind. 357, (held proper under the pleadings.)

in this case cannot recover if the jury shall find from the testimony that the goods shipped by the plaintiffs to their consignees in L. were damaged or destroyed from spontaneous combustion caused by their inherent infirmity.[13]

(2) If you believe from the evidence before you that the building described in the policy sued on was not destroyed by fire you will find for defendant. In this connection you are instructed that before the plaintiff can recover, it must appear from the evidence to your satisfaction that the fire caused the destruction of this building. If the building fell down before it was burned, and the fire occurred after the building fell down, and if you so believe from the evidence before you, you will find for the defendant. If the evidence satisfies you that the building was on fire before it fell, and that such fire caused the fall of the building, then you should find for the plaintiff.[14]

§ 426. **Holder of policy not responsible for acts of agent.** If you find that the plaintiff was asked to and did sign the application in blank, and the agent of the defendant filled it up on his own motion without knowledge of the plaintiff as to what the answers were, or if you should find that the plaintiff made true and correct answers, but the agent, in writing the answers, for any reason, wrote incorrect answers, the plaintiff will not be responsible for the acts, mistakes or wrongs of such agent.[15]

§ 427. **Fraud in proof of loss defeats a recovery.**—If you believe from the evidence that the policy in question contained a provision that all fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims under the policy, and that if you further believe from the evidence that the plaintiffs have fraudulently offered to the defendant proofs of loss under the policy containing material statements in regard to the loss under said policy, which the plaintiff knew to be false at the time the same were offered, you will find for the defendant.[16]

[13] Providence and Washington Ins. Co. of Providence, R. I. v. Adler, 65 Md. 163, 4 Atl. 121.

[14] Liverpool & L. & G. Ins. Co. v. Ende, 65 Tex. 124.

[15] Hingston v. Aetna Ins. Co. 42 Iowa, 47.

[16] Shulter v. Ins. Co. 62 Mo. 237.

§ 428. Abandonment of insured boat, justifiable when. (1) Although it was the duty of the master and crew to labor for the recovery of the vessel, they were not bound to do impossibilities; and that if it appeared to practical men that the vessel could not be saved, they would be justified in abandoning her, and were not bound to wait for the decision of the underwriters on the offer to abandon.[17]

(2) If the condition of the boat was such that in the opinon of practical men the great probability appeared to be that she could not be raised and repaired, it was sufficient to justify an abandonment as for a total loss, though she was afterwards raised and repaired at a cost of less than half her value.[18]

(3) If the injury to the boat was such that her repairs would cost more than half her value when repaired at the port of repair, then the assured had the right to abandon; and in estimating the expense of repairs the jury should take into consideration the amount paid by the insurance companies for raising the boat and bringing her to M, if fairly expended; that it was not necessary that the expense of repairs should amount to half the sum named in the policy as the agreed value of the boat, but it was sufficient if equal to half of her value in fact when repaired.[19]

(4) An abandonment not accepted might be waived by the party making it; that the fact that the mortgagee, G, had taken possession of the boat and sold her because of his interest, would not have the effect of waiving abandonment, if he took possession on notice by the insurers that they would no longer be responsible for her, and after her abandonment by G, and did so to protect the interests of all concerned; and that this was a question of intention to be judged by the acts and declarations of said G, done and made at the time.[20]

(5) If the mortgagor was in possession and command of the boat as captain, and the mortgages were forfeited, perhaps neither he nor the mortgagee alone could make an abandonment; but if there was a right to abandon, and the mortgagor, having the

[17] Fulton Ins. Co. v. Goodman, 32 Ala. 113.

[18] Fulton Ins. Co. v. Goodman, 32 Ala. 113.

[19] Fulton Ins. Co. v. Goodman, 32 Ala. 113.

[20] Fulton Ins. Co. v. Goodman, 32 Ala. 113, 114.

command and control of the boat as master, did abandon or offer to abandon to the defendants, and they knew of the existence of the mortgages and did not reject the abandonment on account of the mortgages, and if the mortgagee shortly afterwards, when the offer of abandonment by the mortgagor was still unrevoked, and the boat was still at the disposal of the defendants so far as the mortgagor was concerned, assented to and approved of the abandonment by the mortgagor and made known to the defendants his assent and approval, an abandonment so made, if in other respects good, would be valid.[21]

(6) A parol abandonment was sufficient, and when once rightfully made it fixed the rights of the assured, and could not be forfeited by any subsequent event without the consent of the assured.[22]

§ 429. Boat not in safe and seaworthy condition defeats recovery.—(1) The boat must have been kept in such condition as to be reasonably sufficient to withstand the ordinary perils attending a boat so laid up at that time and place. If she was not so kept the plaintiff cannot recover, no matter what peril she may have encountered. If she was, and encountered wind or waves by which she broke her spars, was driven against the bank and careened so as to be thrown on her side in such a way as to take in water at her seams which were far enough above the waterline so as not to endanger her safety while lying up under ordinary circumstances, and sunk in consequence thereof, then the plaintiff can recover if he had provided and kept at the boat a force of men sufficient to take care of the boat under ordinary perils, whether all such men were directly in his employ and pay or not.[22]

(2) If the boat was seaworthy when laid up, but thereafter her seams were suffered to become open by exposure, which the plaintiff failed to have properly caulked, and she was not in a safe and seaworthy condition requisite for her safety when tied up, then plaintiff cannot recover.[24]

(3) The boat need not have been sufficiently seaworthy to per-

[21] Fulton Ins. Co. v. Goodman, 32 Ala. 113.

[22] Fulton Ins. Co. v. Goodman, 32 Ala. 113.

[23] Enterprise Ins. Co. v. Parisat, 35 Ohio St. 35.

[24] Enterprise Ins. Co. v. Parisat, 35 Ohio St. 35.

form a voyage, but it must have been for her preservation under all ordinary circumstances while tied up during such period of non-user, and if she encountered a peril insured against which she would have safely resisted if seaworthy, but in consequence of being unseaworthy was sunk by encountering a peril insured against, then the plaintiff cannot recover.[25]

[25] Enterprise Ins. Co. v. Parisat, 35 Ohio St. 35.

CHAPTER XXXVI.

CONTRACTS ON DIFFERENT MATTERS.

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ATTORNEY AND CLIENT.

430. Value of services of an attorney.
431. Party not liable for services of attorney—When.

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432. Submitting disputes to arbitration.

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433. Party hiring horse liable for injury.
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435. Hotel losing property of guest entrusted to it.

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439. What is essential to entitle one to commissions.
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449. Father entitled to minor child's services and earnings.
450. Minor remaining with family after full age.
451. Minor liable on his contracts—When.
452. Head of family or householder.

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456. Unchastity of woman not breach of contract.
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459. Each partner has power to bind all others.
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465. Reviving a claim barred by statute of limitations.
466. The promise reviving discharged claim must be clear.
467. Payment on running account —How applied.
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OTHER MATTERS.

469. Rights in contract may be waived.
470. Correspondence constituting contract.
471. Written contract cannot be varied by parol proof.
472. Unsigned contract binding.
473. Execution and delivery of deed.

Attorney and Client.

§ 430. **Value of services of an attorney.**—(1) If the jury find from the evidence that the plaintiff has performed services for the defendant, with her consent, since September, 1873, and has advanced and paid moneys for her while acting as her solicitor, in matters connected with her employment, they will find for the plaintiff a reasonable value for such services, as shown by the evidence, and also the amount of moneys which the evidence shows he has advanced for her.[1]

(2) In ascertaining the reasonable value of the services of plaintiff you will consider the nature of the litigation, the amount involved and the interests at stake, the capacity and fitness of the plaintiff for the required work, the services and labor rendered by plaintiff, the length of time occupied by him and the benefit, if any, derived by defendants from the litigation. You are further instructed to look at all the evidence in the case, and to exercise your sound discretion and judgment thereon, and allow the plain-

[1] Bennett v. Connelly, 103 Ill. 50, 55.

tiff such reasonable amount as you may believe he is justly entitled to, not to exceed the amount claimed in his petition.[2]

(3) If you find from the evidence before you that the plaintiff has performed any services for the defendant, with his consent, since the month of September, 1873, and has advanced and paid moneys for him while acting as his solicitor in matters connected with his employment, then you will find for the plaintiff a reasonable value for such services, as shown by the evidence, and also the amount of moneys which the evidence shows he has advanced for him; and in ascertaining the reasonable value of the services of the plaintiff you will consider the nature of the litigation, the amount involved, the interests at stake, the capacity and fitness of the plaintiff to perform the work required, the services and labor rendered by the plaintiff, the length of time occupied by him and the benefit, if any, derived by the defendant from such litigation.[3]

§ 431. Party not liable for services of attorney—When.—(1) Notwithstanding the land company may have been benefitted by the services rendered by the plaintiff in the case of G against B if you believe such to be a fact, yet the jury are not authorized to go beyond the parties making the contract by which such services in such cause were procured in search of an implied promise to pay for such incidental benefit.[4]

(2) So far as the liability of this defendant land company is concerned, it makes no difference what plaintiffs understood as to the defendant being liable to them for their fee in said case of G against B. If you believe from the evidence that plaintiffs' services in said cause were not procured by the defendant, then this defendant is not liable to plaintiffs for their services in said case, and your verdict should be for the defendant.[5]

(3) The law is that when plaintiffs were employed, and entered upon their employment in the case of G against B, their duty was a vigilant prosecution of the rights of I in that litigation. If you believe from the evidence they were employed

[2] International & G. N. R. Co. v. Clark, 81 Tex. 48, 16 S. W. 631.

[3] Bennett v. Connelly, 103 Ill. 55; International & G. N. R. Co. v. Clark, 81 Tex. 48, 16 S. W. 631.

[4] Humes v. Decatur Land Im. & F. Co. 98 Ala. 465, 13 So. 368.

[5] Humes v. Decatur Land Im. & F. Co. 98 Ala. 461, 13 So. 368.

by the defendant, it is immaterial what benefit the land company derived from the services rendered by them in this cause in the prosecution of the rights of said G. If said services were not procured by said land company, it is not liable to plaintiffs in this case.[6]

(4) The parties making the contract by which plaintiffs' services in the case of G against B were procured, if you find such contract was made, are alone liable to plaintiffs for their fee in said cause.[7]

Arbitration.

§ 432. **Submitting disputes to arbitration.**—(1) If you find from the evidence that the plaintiff and the defendant agreed to submit their differences to arbitration, and if you find such award was made as agreed, you should find for the plaintiff for the amount found by the arbitrators in such matter, unless you further find (1), that said award does not include all the differences in dispute between the plaintiff and defendant at the time of the alleged award; or (2) that the defendant was not accorded a reasonable notice of the time of the hearing.[8]

(2) If you believe from the evidence that one of the arbitrators, G, was induced to resign or withdraw from the arbitration by reason of the agreement of the other two arbitrators to withdraw and resign their authority as such arbitrators, and thereby the said arbitrator, G, so resigning was prevented from meeting with the arbitrators at the time of the making of the award, in such case the award is void, and you should find for the defendant.[9]

Bailments.

§ 433. **Party hiring horse liable for injury.**—(1) If you believe from the evidence that the defendant hired the horse from the plaintiff to go to one or more particular places specified in the contract, and that he went to another and a different place in a

[6] Humes v. Decatur Land Im. & F. Co. 98 Ala. 461, 13 So. 368.

[7] Humes v. Decatur Land Im. & F. Co. 98 Ala. 465, 13 So. 368.

[8] Amos v. Buck, 75 Iowa, 654, 37 N. W. 118.

[9] McCord v. McSpaden, 34 Wis. 549.

different direction and over a different route from what was specified in the contract, that would amount to a conversion of the horse; and if the horse died while in his possession and after he had thus converted it to his own use, he would be liable for the value of the horse at the time of the conversion.[10]

(2) If the plaintiffs and defendant made a contract, by which the defendant hired the plaintiffs' horse and carriage for use in driving to and from Lynnfield only, and in violation of that contract the defendant drove the plaintiffs' horse and carriage to Lynnfield and from thence several miles to Peabody, he became thereby responsible to the plaintiff for any injury to such horse and buggy in Peabody, or while driving from Lynnfield to Peabody. Whether or not such injury was caused by any want of ordinary care or skill of the defendant in driving the horse and carriage from Lynnfield to Peabody, or in tying or managing the horse and carriage in Peabody, or by any insufficiency of the harness of said horse, or any physical infirmity or want of docility of the horse, would be immaterial, as the defendant's use of the horse and carriage, in driving beyond Lynnfield in violation of his contract, was a conversion of such horse and carriage, in the nature of an original unlawful taking of such horse and carriage, at the time of the defendant's leaving Lynnfield, and such conversion caused the defendant to be liable in damages to the plaintiff therefor, equal to the difference between the value of such horse and carriage at the time it was taken by the defendant from Lynnfield, and the value of the same when restored by the defendant to the plaintiff. Accepting pay for the use of the horse under such a contract was a waiver of the conversion.[11]

(3) If the plaintiffs and defendant made a contract by which the defendant hired the plaintiff's horse and carriage for use in driving for pleasure for a time and distance not fixed or agreed upon by them, the defendant rightfully drove the horse to Lynnfield and thence to Peabody, and was responsible for an injury to such horse or carriage, which was caused by the defendant's want of ordinary care and skill in driving or managing such horse and carriage in Peabody, to be determined in

[10] Malone v. Robinson, 77 Ga. 719.

[11] Perham v. Coney, 117 Mass. 103.

view of the fact known by the plaintiffs, and presumed to have been considered by them in letting the horse, that the defendant was a one-armed man, but was not responsible for any injury to such horse and carriage caused by the insufficiency of the plaintiffs' harness for driving or tying the horse, or by reason of any disease or physical infirmity, or want of docility of the horse, or by any peculiar habits or dispositions of the horse when tied, unless the defendant was notified of such peculiar habits and dispositions.[12]

(4) If the jury find from the evidence that the defendant undertook for a reward to deliver the team of horses and vehicle attached, and described in the evidence, to a person designated by the plaintiff, and in the course of this undertaking intrusted the driving of the team to one who, by his negligence, permitted the horses to run away, whereby the plaintiff suffered damage, then the plaintiff is entitled to recover, and the jury will allow such damages as they may find from the evidence the plaintiff suffered by reason of the defendant's fault in the premises.[13]

(5) Although it is true that, by hiring his mare to the defendants for use on the street cars, the plaintiff impliedly engaged that she was reasonably fit for that purpose, this gave the defendants no right to use her after it became manifest to them that by reason of her nervousness, or fretfulness, or diseased condition, she was not fit for such work. They had no right to use her. If her board devolved upon them, it was their duty to supply her with plentiful food and water at the proper time. It was their duty, also, not to require her to do more work than it was manifest she could perform without injury, and if, during such use, it was plainly evident to the defendant's employés that she was exhausted, overheated, or suffering by reason of disease, and her continued use was dangerous to her health and life, it was their duty then to abstain from further use of her without obtaining the plaintiff's consent to the same; and if, without so doing they negligently persisted

[12] Perham v. Coney, 117 Mass. 404.

[13] American D. T. C. Co. v. Walker, 72 Md. 457, 20 Atl. 1.

in such use, and by reason of the same she was so injured that she died, the defendants are liable.[14]

(6) If you find from the evidence that the plaintiff hired his mare to the defendants for the purpose of being used by them in pulling street cars, the plaintiff thereby engaged and bound himself that the mare so hired was reasonably fit and suitable for such purposes and such uses. If, therefore, you find that the mare so hired was injured while in the use of the defendants in pulling their street cars, without their fault, and through the nervousness and fretfulness of said mare, or because of her diseased condition at the time the plaintiff hired her to the defendants, or because of her unfitness to pull said street cars, then you should find for the defendants.[15]

§ 434. **Party liable for money intrusted to him.**—If the jury believe from the evidence that the defendant was intrusted with the safe-keeping of money belonging to the plaintiff, and that part of said money was delivered to him on Sunday, and the defendant thereafter on a week day admitted the sum of one hundred and sixty-seven dollars and forty-four cents to be in his hands belonging to the plaintiff, and promised to apply the same in payment of the rent for the premises mentioned in and under the contract offered in evidence, but neglected and failed to apply said money in payment of said rent, then the jury must find for the plaintiff for said amount of money in the hands of the defendant, and in their discretion may allow interest thereon from the time the defendant failed to pay the same as promised by him[16]

§ 435. **Hotel losing property of guest entrusted to it.**—If the jury find from the evidence in the cause that the plaintiff was a guest of the defendant, as alleged in the declaration in this cause, that the trunk of the plaintiff was brought by him into the hotel of the defendant, while the plaintiff was a guest in said hotel, that the said trunk contained the bank notes testified to by the plaintiff, and that said trunk and its contents

[14] Bass v. Cantor, 123 Ind. 446, 24 N. E. 147.

[15] Bass v. Cantor, 123 Ind. 446, 24 N. E. 147.

[16] Haacke v. Knights, &c. 76 Md. 431, 25 Atl. 422.

were lost while so in said hotel, the plaintiff cannot recover for said bank notes in this action, unless they shall also find that the said bank notes were designed by the plaintiff for his use while on his journey, or while a guest in said hotel, or unless they shall find that they were lost by the fraud or negligence of the defendant.[17]

Banking Transactions.

§ 436. **Company holding one out as agent.**—(1) The indorsement on the face of the check sued on is in proper form to constitute a certification thereof; and if you find from the evidence that defendant's paying teller at the time of making said indorsement had authority or apparent authority, as defined in these instructions, to make the indorsement of certification upon said check, and if you find further from the evidence that the plaintiff acted in good faith and without fraud, as defined in another instruction herewith given, then your verdict must be for the plaintiff.[18]

(2) The plaintiff is not required to prove that the defendant's paying teller had actual authority conferred upon him by defendant to certify checks, but that plaintiff had the right in good faith to rely upon the apparent authority of said paying teller to certify checks. And the court further instructs you that whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether it be in a single transaction or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as may be necessary to protect the rights of third persons who have relied thereon in good faith, and in the exercise of reasonable prudence, and the principal will not be permitted to deny that such other was not

[17] Treiber v. Burrows, 27 Md. 132.

[18] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.

his agent authorized to do the act that he assumed to do, provided that act was within the real or apparent scope of the presumed authority.[19]

(3) If you find from the evidence that the check sued on was certified by the authority of the defendant company, and that at the time of said certification there was sufficient funds of the maker of said check on deposit with defendant to pay said check, then defendant had the right to retain out of the funds of said maker a sufficient amount to pay said check whenever the same might be presented.[20]

§ 437. **Attempt to defraud company.**—(1) If the jury find from the evidence that the writing or paper sued upon by the plaintiff was marked or certified "good" in the name of the defendant by an employé, and that the plaintiff obtained such marking or certification in pursuance of a design or plan to defraud the defendant by keeping or secreting said paper for such time as might be necessary to permit the money represented by such paper to be drawn out upon other orders, writings or checks, with the intention of then presenting the said writing, and demanding payment of the amount ordered therein to be paid, the jury will find for the defendant.[21]

(2) If the jury find from the evidence that the plaintiff and one M, his brother, confederated or conspired together to defraud the defendant by placing it in such a position that it might be called upon to pay the amount of the writing or check sued upon by plaintiff, after having already paid out upon other orders or checks the money to the credit of the drawer or drawers of such order or check, and that the plaintiff is in possession of the instrument sued on, as a party to such confederacy or conspiracy, the jury will find for the defendant.[22]

[19] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.

[20] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.

[21] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.

[22] Muth v. St. Louis T. Co. 94 Mo. App. 94, 67 S. W. 978.

Brokers.

§ 438. **Broker entitled to commissions—When.**—(1) In ordinary cases, the law is well settled where a broker is employed in reference to a sale of real estate, that when he brings a buyer to the seller who is willing and ready to enter into an agreement with the seller for the purchase of his property on the terms that the seller has fixed, and the seller is satisfied to accept him as a purchaser, then the broker has earned his commission. The earning of it is not dependent, in such cases, on the question as to whether the buyer carries out the contract, or as to whether the seller is able to complete his contract. Therefore, in the absence of any express agreement to the contrary, the law is that the broker is entitled to his commissions when the vendor accepts, when he (the broker) brings to the vendor a party ready and willing to accept the terms fixed by the vendor, and the party is satisfactory to the vendor, and he enters into a contract with him. The contention is that there was a different agreement here. That question is for you to determine. If you find that this was an ordinary contract, made without any conditions, the broker employed in the usual way, and that there was no bargain entered into between the plaintiff and the defendant, Mr. B, that he was only to be paid his commission in case this sale went through, then plaintiff is entitled to recover. If, however, the bargain agreed upon between plaintiff and defendant was that commission was only to be paid in case this whole transaction went through, as provided by the terms of the contract of sale, the plaintiff is not entitled to recover, unless you are satisfied from the evidence here that the defendant capriciously refused to carry out the contract.[23]

(2) If the jury find from the evidence that plaintiff was engaged in the business of a property broker in the city of B, and that the defendant offered certain property for sale to the park commissioners of said city, and that he employed the plaintiff to aid and assist him in effecting said sale, either by previous authority or the acceptance of the plaintiff's agency

[23] Kalley v. Baker, 132 N. Y. 5, 29 N. E. 1091.

and the adoption of his acts, and that the plaintiff did diligently and faithfully occupy his time and render services in so aiding him to effect said sale, and a sale of said property to said commissioners was in a short time made and effected, and that said services were of advantage and value to the defendant in effecting the said sale, then the plaintiff is entitled to recover such sum as the jury may find from the evidence to be a reasonable remuneration to the plaintiff for said services; and in ascertaining what is a reasonable remuneration, the jury may consider the rate of compensation, which they may find from the evidence was usual and customary in the said city for services of a like kind.[24]

(3) If the jury find from the evidence that the defendant employed the plaintiff to procure a purchaser for the property spoken of by the witnesses, and the plaintiff did procure a purchaser for said property, and the said property was sold by the defendant to the purchaser procured by the plaintiff, then the plaintiff is entitled to recover such compensation as they may find usual and customary.[25]

(4) If you believe from the evidence in this case that the defendant employed the plaintiff, Stewart, as his agent to negotiate the sale of his, the defendant's, street railway property, and that the plaintiff undertook said employment and was instrumental in bringing together the buyer and the defendant, then and in that case the plaintiff is entitled, as a matter of law, to recover from the defendant compensation for his services, regardless of the fact that the defendant himself concluded the sale, and upon a price less and upon terms different from those at which the plaintiff was authorized to sell.[26]

(5) If the jury find that the defendant employed the plaintiffs as his brokers to buy and sell on commission stocks, bonds and grain for him in the markets of New York, Baltimore and Chicago, under an agreement that the defendant should secure to the plaintiffs by depositing with them a margin as testified to by the defendant, and if they find that the plaintiffs, through their agents, executed said orders of the defendant in said

[24] Walker v. Rogers, 24 Md. 237.
[25] Jones v. Adler, 34 Md. 440.
[26] Henry v. Stewart, 185 Ill. 452, 57 N. E. 195. See, Fessenden v. Doane, 188 Ill. 228; Swigart v. Hawley, 140 Ill. 186, 190.

markets as required to be found in the plaintiffs third and fourth prayers, according to the custom and usage of said markets, and that plaintiffs paid all money necessary and required to be paid in the execution of such orders, and received all moneys that became receivable in the execution of such orders, and that they reported all such transactions to the defendant and charged him with the money so paid for him and credited him with the money so received by them for him; and if they find that the defendant failed to secure the plaintiffs by keeping up said margin when required, and that the plaintiffs thereupon sold such securities of the defendant as they had in hand after notice to him in the manner shown in evidence and reported such sales to defendant, then the plaintiffs are entitled to recover the loss sustained by them in the execution of the defendant's orders, as above set forth, and their commissions for executing the same.[27]

(6) If the jury shall find from the evidence that the plaintiff was a stock broker in B, and that the defendant on March 9, 1868, authorized him to purchase on his account two hundred shares of the C stock, and shall find that the place where said stock was ordinarily bought and sold was at the Stock Exchange, in New York, and shall further find that the plaintiff therefor actually purchased two hundred shares of said stock through his sub-agents, P & Co., stock brokers in New York, and at a price not exceeding the price limited by the defendant, and that the defendant did not supply the plaintiff with funds to make said purchase, and that the plaintiff had funds and credit with his sub-agents, which were applied by them in making said purchase; and if they shall further find that the defendant, on the next day after the purchase, was informed of said purchase, and that the plaintiff notified the defendant on March 17, 1868, by letter addressed to him at his proper post-office, that he was ready to deliver to him two hundred shares of said stock so purchased on his account, and that unless he came forward and paid for it, he, the plaintiff, on or after March 19, 1868, would sell said stock at the risk and cost of the defendant; and if they shall further find that the plaintiff

[27] Stewart v. Schall, 65 Md. 289, 4 Atl. 399.

had ready for delivery to the defendant such stock, and that he did sell on March 21, 1868, at the Stock Exchange, in New York, two hundred shares of said stock for and at the risk of said defendant, and that after applying the whole proceeds of said sale there was a loss upon the said original purchase, which said loss the plaintiff did pay to his sub-agents, then the plaintiff is entitled to recover the amount of said loss or the difference in price, together with his reasonable commission for the purchase and the expense of said resale.[28]

§ 439. **What is essential to entitle one to commissions.**—(1) If a principal rejects a purchaser and the broker claims his commission, he (the broker) must show that the person furnished by him (the broker) to make the purchase was willing to accept the offer precisely as made by the principal, that he was an eligible purchaser and such a one as the principal was bound in good faith, as between himself and the broker, to accept.[29]

(2) If the plaintiffs agreed and undertook to sell the defendant's farm for a commission upon the price realized, then in order to earn their said commission it must appear by a preponderance of the evidence that they effected a sale of the farm to a party ready, willing and able to perform the conditions of the sale. The mere procuring of a person to enter into a contract to purchase the land, unless such purchaser was ready, willing and able to make the cash payments named in the contract, and to make the mortgage therein named for the deferred payments, would not be sufficient to entitle the plaintiffs to their commission.[30]

(3) If the principal rejects a purchaser secured by the broker, and the broker claims commission for his services, he must show that the person secured by him as purchaser was willing to accept the offer precisely as made by the principal, that he was an eligible, competent purchaser, such as the principal was bound in good faith, as between himself and the broker, to accept. The mere procuring of a person to enter into a contract to purchase the land, unless such person was ready, willing and

[28] Worthington v. Yormey, 34 Md. 185.

[29] Buckingham v. Harris, 10 Colo. 458, 15 Pac. 817.

[30] Stewart v. Fowler, 37 Kas. 679, 15 Pac. 918.

able to make the payments named in the contract, and to make the mortgage therein mentioned for the deferred payments, would not be sufficient to entitle the plaintiff to recover commission.[31]

(4) The plaintiffs cannot recover in this case upon the dealings in grain between them and the defendant unless the jury shall find from the evidence all the following facts: (1st.) that the defendant authorized said dealings; (2d.) that the purchase and sales authorized by him were actually and bona fide made; (3d.) that the grain directed by him to be bought was in fact bought by the authorized agent or agents of the plaintiffs in C, and was in fact delivered by the seller or sellers to and accepted by said authorized agent or agents; (4th.) that the grain directed by the defendant to be sold was in fact sold by the authorized agent or agents of the plaintiff in C, and was in fact delivered by such authorized agent or agents to the purchasers thereof.[32]

§ 440. Failure to comply with contract prevents recovery. (1) If the jury find from the evidence that on April 30, 1885, the plaintiff authorized the defendants to buy wheat for him in quantities of five thousand bushels at a time whenever they bought at the same time and price ten thousand bushels for themselves, and not otherwise, and that the plaintiff agreed to pay to defendants a commission of one-fourth of one per cent. per bushel for all wheat so bought for him by them, and that defendants undertook and agreed that they would not buy five thousand bushels for plaintiff unless they at the same time and price bought ten thousand bushels for themselves; and shall further find that defendants did thereafter, on May 1, 1885, and June 8, 1885, respectively, buy for the plaintiff five thousand bushels of wheat and charged the same to plaintiff, and that they represented to plaintiff that they had on each of said occasions bought ten thousand bushels for themselves at the same time and price as that at which they bought for plaintiff; and shall find that the plaintiff, on the faith of such representation (should

[31] Buckingham v. Harris, 10 Colo. 458, 15 Pac. 817; Stewart v. Fowler, 37 Kas. 679, 15 Pac. 918.

[32] Stewart v. Scholl, 65 Md. 294, 4 Atl. 399.

the jury find it to have been made) and in the belief that defendants had bought ten thousand bushels for themselves as aforesaid, paid to defendants on account of the purchase of, and on account of the depreciation, when sold, in the value of said wheat bought as aforesaid for him (should the jury so find) the moneys testified to by plaintiff to have been paid; and shall further find that in fact the defendants did not upon either of the said occasions buy ten thousand bushels for themselves, then the plaintiff is entitled to recover the moneys so paid.[33]

(2) If you find from the evidence given to you in this cause that the defendant employed plaintiff as a real estate broker to sell his farm, and that the plaintiff, for the purpose of aiding and assisting him in selling said farm, and for the purpose of procuring a purchaser therefor, took into his employ and service one W, and if you further find that said W, aiding and assisting said plaintiff in the sale of said farm, took to this defendant one L, as a probable purchaser for said farm, and if you further find that in the presence of said W the said L inquired of this defendant the selling price of said farm and then and there informed the defendant that he desired to purchase direct from the owner, and that he had never seen or been introduced to the plaintiff, and that he would not purchase of commission men; and you further find that the defendant did not know that the sale was being made by the plaintiff, and if the said W stood by and did not inform the defendant that the sale was being made by the plaintiff, the plaintiff would now be estopped from claiming that the said W was acting for and on his behalf in the sale of said farm, you should find for the defendant.[34]

§ 441. Notice to be given under the contract.—(1) If the jury find from the evidence that specific instructions were given by the defendant to the plaintiff on March 9, 1868, that in the event of the purchase of the stock in the evidence mentioned, the plaintiff should immediately communicate the fact of the purchase to the defendant, and inform the plaintiff where to send the notice; and if they shall further find that the said

[33] Burt v. Myer, 71 Md. 467, 18 Atl. 796.

[34] Mullen v. Bower, 22 Ind. App. 294, 300.

stock was purchased on the said 9th of March, by the plaintiff, and that the plaintiff did not communicate the fact of the purchase immediately to the defendant, according to the order and instructions of the defendant, then the defendant was not required to take said stock.[35]

(2) If the jury shall find that the defendant resided near R, in Baltimore county, and the plaintiff in B city, and that there was a daily mail from B to R, which was the proper postoffice of the defendant, and that the plaintiff deposited in the postoffice in B on March 17, a letter containing the notice mentioned in the first instruction, then the said notice was sufficent, notwithstanding the fact that it was not received by the defendant until March 24, 1868, and after the sale.[36]

§ 442. **Burden of proof on plaintiff—When.**—The burden of proof is on the plaintiff to make out his case by a preponderance of the evidence. In this case the plaintiff's claim, according to his bill of particulars, is for commissions alleged to have been improperly retained, and not paid to him, as shown by statements of account rendered and filed with said bill of particulars; and the jury are instructed that the burden is on the plaintiff to show by a preponderance of the evidence that the items referred to in such statement of accounts, and charged in his bill of particulars, are not lawful charges against the plaintiff, otherwise he is not entitled to recover in this action, and you must find for the defendant.[37]

§ 443. **Payment of interest on monthly balance.**—If the jury find the facts stated in the plaintiffs' third, fourth and fifth prayers, and further find that, in the execution of the orders of the defendant therein referred to, the plaintiffs paid to the brokers employed by them interest on the monthly balances due said brokers for the execution of said orders, and reported said payments, if entered to the defendant, and if they find that the custom and usage of the business in the markets where such orders were executed was to charge interest on such monthly balances

[35] Worthington v. Yormey, 34 Md. 189.

[36] Worthington v. Yormey, 34 Md. 186.

[37] Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692.

of accounts, then the plaintiffs are entitled to recover the interest so paid by them on account of the defendant.[38]

Building Contracts.

§ 444. Contractor complying with contract can recover.—(1) If the jury believe from the evidence that the plaintiff, either himself or through others employed by him, constructed the building in the agreement in the declaration mentioned, in accordance with the specifications in said agreement set forth, and relying upon the contract in the declaration mentioned, then the jury shall find for the plaintiff the price therefor in said agreement stipulated to be paid by defendant to the plaintiff, although from the evidence the jury may believe that outside parties, by parol agreement, guaranteed that the plaintiff should lose nothing by his construction of said building under said agreement, and actually advanced to the plaintiff the money necessary to pay for the materials and labor employed in the construction of the said building.[39]

(2) In deciding whether or not the plaintiff was proceeding with said building in compliance with the contract, you are instructed that there must have been a substantial compliance in every material particular in each item as called for by a fair, reasonable and practical construction of the contract, and plans and specifications, taken together, and where there is a conflict, if any, in these, this should be reconciled in a practical, workmanlike manner, so as to arrive at the fair and reasonable intention of the same.[40]

§ 445. Parties abandoning original contract.—If the plaintiff wilfully abandoned the work, leaving the house not finished according to the contract, he cannot recover. But if a party in good faith proceeds under a contract, and doing what he reasonably supposes is required and substantially completes the work and the other party accepts the benefit of it, although the contractor may not have done all that was really his duty, or in

[38] Stewart v. Schall, 65 Md. 289, 4 Atl. 399.

[39] Ferguson's Adm. v. Wills, 88 Va. 139, 13 S. E. 392.

[40] Linch v. Paris L. & G. E. Co. 80 Tex. 23, 15 S. W. 208.

the exact manner required by the contract, still the contractor may maintain an action to recover the value of his labor and materials, but he will not necessarily be entitled to recover the cost of his materials or the ordinary price of his labor. The party for whom the work is done is entitled to have deducted from the contract price the difference between the value of the work as done, and its value if it had been done in accordance with the contract.[41]

Domestic Relations.

§ 446. Husband entitled to income of wife's estate.—The husband is entitled to the rents, income or profits of the wife's statutory separate estate and is not required to account to her, her heirs or representatives for them; and he may use them or invest them for himself if he chooses; or he may give them to his wife in the same manner as he may give any other property. But if she claims them as a gift from her husband, she must show by proof that he had divested himself of the title and invested it in her; he must abandon his right and title to it and transfer it to her by such words, acts or writing as will clearly show that the title had passed from him to her.[42]

§ 447. Liability of wife for husband's debts.—(1) If the jury believe from the evidence that the account which the defendants were owing to M, and to secure which they had given M a mortgage on this property, was for articles of comfort and support of the household, suitable to the degree and condition of the family, and for which the husband would be liable at common law, and that the plaintiff, at the request of the defendants, paid said account for them, and, in consideration of the payment of said account, they executed to him the said bill of sale for the property sued for, then the contract was legal, and binding on the wife and on her statutory separate estate, so far as conveyed by said bill of sale, and the plaintiff is entitled to recover.[43]

[41] Cunningham v. Washburn, 119 Mass. 224.

[42] Logwood v. Hussey, 60 Ala. 421. The rule is wholly different in states where the rents and profits of a married woman's land are by statute declared to be her separate property. Montgomery v. Hickman, 62 Ind. 598.

[43] Logwood v. Hussey, 60 Ala. 421.

(2) If the jury should find that the account due M was not for articles of comfort and support of the household, suitable to the degree and condition of the family, but that it was the personal debt of the husband, and payment of said debt of her husband was the consideration of the sale of her property, then her statutory separate estate was not liable for and could not be sold to pay her husband's debt; and if any part of the property in the bill of sale was her statutory estate, said bill of sale was void as to it, and the plaintiff cannot recover it.[44]

(3) If the jury find from the evidence that L had made a gift of the rents, income or profits of his wife's separate estate to her, in such manner as divested him of the right and title to them, and invested it in her, and that this gift was made before the debt to M was incurred, which was paid off for him by the plaintiff, then the said rents and profits so given became a part of her statutory separate estate, and could not be sold by her, unless for the payment of a debt for articles of comfort and support of the household, suitable to the degree and condition in life of the family, and for which the husband would be liable at common law; and if the jury find that the property sued for was bought with the proceeds of her separate estate received from her father, or with the rents and profits which her husband had given her, in the manner as before stated, then the sale of said property conveyed no title to the plaintiff, unless it was in payment of articles of comfort and support, as before stated.[45]

§ 448. **Duty of both parents to support children.**—(1) No promise on the part of the father to pay a mother for anything she may do in the discharge of her moral duties to their offspring can be implied. The mother is as much morally bound to care for, support, nourish and educate the child as the father; and the law will not allow her to recover for so doing, simply because the father omits his duty.[46]

§ 449. **Father entitled to minor child's services and earnings.**—(1) When a person or corporation employs a minor, it devolves

[44] Logwood v. Hussey, 60 Ala. 421.

[45] Logwood v. Hussey, 60 Ala. 421.

[46] Lapworth v. Leach, 79 Mich. 20, 44 N. W. 338.

on such employer to obtain the consent of the father, when such minor is under the control of the father, and while said minor forms a part of the father's family. The father is liable for the support of his minor child and is entitled to the earnings of said child. And where the son, through the negligence of the employer or its servants, receives an injury incapacitating him from labor, and rendering him less serviceable up to his arrival at the age of twenty-one years, the employer thus engaging a minor, without the knowledge or consent of his father, is liable to the father in damages.[47]

(2) When a person, company or corporation employs a minor, it devolves upon such employer to obtain the consent of the father when such minor is under the control of his father and forms a part of his father's family. A minor cannot, without the consent of his father, make a legal and binding contract. The father is liable for the support of his child during the child's minority and is entitled to his earnings.[48]

(3) Under the law the father is entitled to the services of his minor children during their minority. Minors cannot, without their father's consent, make legal contracts; nor without such consent, either before or by acquiescence after knowledge of the father, engage in business for themselves. If you believe, then, from the evidence that M was a minor, under twenty-one years of age; that, without the knowledge or consent of his father, he engaged himself to defendant, and while so engaged received the injury alleged, then, if such injury was not caused by said M's own negligence, plaintiff is entitled to recover for the loss of his son's services while under medical treatment, to his necessary expenses in perfecting a cure, including medicines and extras required in effecting a cure; also to all reasonable medical bills for which the father is liable, and to such damages as result and flow directly from the injury—such as the diminished value of services up to the arrival at the age of majority of said minor.[49]

(4) Under the law, the father is entitled to the services of his minor children during their minority. Minors cannot, without their

[47] Houston & G. N. R. Co. v. Miller, 49 Tex. 323.

[48] Houston & G. N. R. Co. v. Miller, 49 Tex. 323.

[49] Houston & G. N. R. Co. v. Miller, 49 Tex. 323.

father's consent, make legal contracts; nor without such consent engage in business for themselves. If you believe from the evidence that E was a minor, under twenty-one years of age; that, without the knowledge or consent of his father, he engaged himself to defendant, and while so engaged received the injury alleged, then if such injury was not caused by said minor's own negligence, the plaintiff is entitled to recover for the loss of his son's services while under medical treatment, to his necessary expenses in perfecting a cure, including medicines and extras required in effecting a cure; also to all reasonable medical bills for which the father is liable, and to such damages as result and flow directly from the injury—such as the diminished value of services up to the arrival at the age of majority of said minor.[50]

§ 450. **Minor remaining with family after full age.**—If the plaintiff, after she arrived at full age, continued to live with her father, as she had done previously, with no new duties or responsibilities assumed in the family by her, and was provided with necessaries, etc., as one of the family, she would not be entitled to recover for such services, unless there was an express understanding between her and her father, before these services were rendered, that she should receive such compensation; and if the note was given for such past services, and there was no such understanding existing between them, she cannot recover. But if the note was given for such past services, the fact that it was given will raise a presumption that there had been a previous understanding or agreement between the plaintiff and her father that such compensation was to be made, and unless such presumption is overcome by evidence that no such understanding existed, the plaintiff will be entitled to recover.[51]

§ 451. **Minor liable on his contracts—When.**—If the jury believe from the evidence that A, after she became twenty-one years of age and before marriage, with knowledge that she, on account of infancy, was not liable to the plaintiff for any purchases she may have made of him, expressly promised that she would pay for any portion of the articles mentioned in the bill

[50] Houston & G. N. R. Co. v. Miller, 49 Tex. 323.

[51] Pitts v. Pitts, 21 Ind. 314.

of particulars, such a promise would be a ratification of the previous contract to the amount she promised to pay. If she promised to pay all, it would render her liable for all. If she promised to pay a part, or a certain sum, it would render her liable for such part, or for such certain sum; and if she, after such promise, paid any money to the plaintiff, it would go as a credit on the amount for which she made herself liable on the new promise.[52]

§ 452. **Head of family or householder.**—As to what constitutes a householder within the meaning of the statute, you are instructed that a householder is the father or head of a family whom he supports or assists in supporting. It is not necessary that the family should keep house in the ordinary sense of that term. The father, as head of a family, may put his family out to board, and still be entitled to the benefit of the law. If the plaintiff, at the time of said demand for exemption, and after the bringing of this suit, was supporting his wife or aiding in her support, and was intending to continue to live with her and return to Indiana to reside and remain permanently or indefinitely, when his business in Colorado was terminated and finished, then he was a householder within the meaning of that term in the statute providing for the exemption of property from sale on execution.[53]

Landlord and Tenant.

§ 453. **Liability of tenant for damage to building.**—(1) If the jury find that the defendants entered into possession of the building in question under the lease in evidence, and made such alterations as they thought fit in order to adapt it to their purpose under the authority given in the lease, and afterwards stored a large quantity of heavy goods therein, and that owing to the excessive quantity of said goods, if they shall find such quantity was excessive, or by the manner in which they were stored by the defendants a large part of the building was caused to fall down, then the plaintiffs are entitled to recover.[54]

[52] Ogborn v. Hoffman, 52 Ind. 439.
[53] Astley v. Capron, 89 Ind. 175.
[54] Machen v. Hooper, 73 Md. 354, 21 Atl. 67.

(2) If the jury find that the injury shown by the evidence to have been sustained by the building in question, occurred while the same was in the occupation of the defendants under the lease offered in evidence, and that the said injury is attributed to the alterations made in the building by the defendants in connection with the use thereafter made of it by them, then the plaintiffs are entitled to recover in this action the damages which the jury may find from the evidence they have thereby suffered.[55]

(3) If the jury shall find from the evidence in this case, that the defendants entered upon the said demised premises in pursuance of the lease declared on, and which is in evidence, and shall further find that they used and occupied the said premises, and that during said term or tenancy, and while the defendants were so in possession of said premises, they used the said building or warehouse as persons of ordinary care and prudence would have done, looking to its character, size, apparent construction and strength, and that the said house fell down during said tenancy in consequence of some defect in the structure of the same or on account of a want of a proper thickness of the wall, or on account of inferior materials used or on account of the ordinary decay of the materials used in the erection of said building, all of which was unknown to the defendants, and shall further find that the same could not have been discovered by reasonable and ordinary diligence, then the plaintiffs are not entitled to recover in this action, and the verdict must be for the defendants.[56]

§ 454. New leasing of premises discharges guaranty.—If the jury believe from the evidence that N, from November, 1857, to the time of his death, and his widow after his decease to May, 1859, occupied the premises in question at a different rate of rent and under a different agreement from that specified in the lease in question, then the jury may infer a new leasing of the premises, and the defendant is thereby discharged upon his guaranty and is entitled to a verdict in his favor.[57]

[55] Machen v. Hooper, 73 Md. 353, 21 Atl. 67.

[56] Machen v. Hooper, 73 Md. 355, 21 Atl. 67.

[57] White v. Walker, 31 Ill. 438; Smith v. Wise, 58 Ill. 141, act of landlord is an eviction and terminates lease. Several instructions held good.

Marriage Contracts.

§ 455. What essential to entitle plaintiff to recover.—In order to entitle the plaintiff, H, to recover in this case, it is necessary that it shall be made to appear to your satisfaction, by a preponderance of the evidence, that at some time before the commencement of this action the defendant promised to marry her in consideration of a like promise by the plaintiff to the defendant to marry him; that the plaintiff thereafter either requested the defendant within a reasonable time and before the commencement of this action to marry her, the plaintiff, in pursuance of such contract, and he refused to do so; or that, by the terms of the contract, a day certain beyond the time of the commencement of this action was fixed for the performance of such marriage contract without performance or offer of performance of the same by the defendant on or before the day so fixed, and that the plaintiff, at all times, from and after the making of such contract or contracts up to the time of the commencement of this action, was ready and willing to marry the defendant.[58]

§ 456. Unchastity of woman not breach of contract—When. (1) Illicit intercourse between parties to a marriage contract, after the promise is made, is no defense to an action for a breach. A plaintiff's immorality or unchaste conduct with third persons after the promise is no defense if done with the defendant's connivance or consent, or, if knowing it, he continued his attentions and engagements.[59]

(2) If the defendant in an action for breach of marriage contract bases his renunciation of and his right to discharge from his contract upon the bad or immoral conduct of the plaintiff, it must appear that his refusal to consummate his promise was due to such bad or immoral conduct, and that he renounced his promise as soon as he reasonably could after the conduct happened, or was discovered by him. Dissolute conduct, upon the part of the woman, is no defense, if the man was a party to it, or connived at it.[60]

[58] McCrum v. Hildebrand, 85 Ind. 205.

[59] Bowman v. Bowman, 153 Ind. 503, 55 N. E. 422.

[60] Bowman v. Bowman, 153 Ind. 503, 55 N. E. 422.

§ 457. **Assessing damages for breach of contract.**—If you find the contract was made and has been broken, and consider the question of damages, you may take into consideration the character of the plaintiff. If it is subject to any criticism on your part, and if she is a woman of coarse manners, coarse in her associations, and imprudent, careless and reckless in regard to her conduct and demeanor, these circumstances you may take into consideration in assessing damages; such a woman is not injured to the same extent by a breach of promise of marriage that one more confiding, retiring and modest would be. Understand that I am passing no judgment upon the plaintiff or suggesting that you shall pass any judgment upon her, but I wish you to understand that if you think she deserves consideration of that kind, it is your privilege and duty to give such consideration to that phase of the matter as you think it deserves.[61]

Partnership Contracts.

§ 458. **What constitutes a partnership.**—(1) Partnership is a contract of two or more competent persons to place their money, effects, labor and skill or some or all of them in lawful commerce or business and to divide the profits and bear the losses in certain proportions.[62]

(2) A partnership in fact can only exist when there is a voluntary agreement made for that purpose and there cannot be such partnership against the intention of the parties to the contract.[63]

§ 459. **Each partner has power to bind all the partners.**—A partnership can only exist as between the parties themselves, in pursuance of an agreement to which the minds of all have assented; but that, when created, each partner has full power and authority to bind all the partners by his acts or contracts in relation to the business of the partnership; and as between the firm and third persons dealing with them in good faith, it is of

[61] Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744. This is objectionable as declaring a fact which it is the province of the jury to pass on under the rule declared in, Indianapolis Street R. Co. v. Taylor, (Ind.), (Jan. 3, 1905).

[62] Weeks v. Hutchinson (Mich.), 97 N. W. 697.

[63] Weeks v. Hutchinson (Mich.), 97 N. W. 697.

no consequence whether the partner is acting in good faith with his copartners or not, provided the act done is within the scope of partnership business, and professedly for the firm; but the relation of the partnership confers no authority on one party to bind the others, except as to transactions within the scope of the partnership business. And if you believe that said F M & H were partners, yet, if you believe that the partnership existing between them was entered into for the sole purpose of buying and selling cattle, then such partnership relation could not authorize either party to sign the firm name as sureties on the bond of a third party. And if you find that the bond sued on was signed by M without the consent of said F & H and without other authority from them, then you should find in favor of said F & H, unless you should further find that said F & H, after being informed that the bond was so signed by M, consented to the same.[64]

§ **460. Partners not general partners.**—If the jury find that the defendants had any arrangement for shipping cattle from S, by which it was agreed that either of them might buy stock on his own responsibility, and upon its delivery for shipment at said place the others might take an interest in any stock so purchased and delivered, if upon examination of it they thought it suitable to ship or not purchased too high; or by which, if they purchased stock when all together, it was to be shipped on joint account; or if, after looking at or agreeing to take an interest in stock purchased by any one of them before delivered at said place, it was to be shipped on joint account and the parties to share in the profits and losses, such facts or agreements did not constitute them general partners, but only partners in each transaction.[65]

Chattel Mortgages.

§ **461. Mortgagee may take possession of the property.**—Under the mortgage defendant had the right to take possession of all the property therein described, at any time he chose to do so, and

[64] Fore v. Hitson, 70 Tex. 520, 8 S. W. 292.

[65] Valentine v. Hickle, 39 Ohio St. 23.

no damage could be assessed against him for such taking. He did not, however, have any right to sell said property before the debt secured thereby became due. In other words, while he would have a right under said mortgage to take possession of all the property therein described, for the purpose of preserving the same until the debt became due, he would have no right to sell the said property unless the debt secured by said mortgage, or some part of it, was due; and if he did sell said property, or any part of it, before the debt secured thereby became due, or any part thereof, then he is liable to account to the plaintiffs for the fair and reasonable value of the property so sold, without reference to the amount for which the sale was made.[66]

Subscription Contract.

§ 462. **Alteration of subscription contract.**—If the jury shall believe from the evidence that at the time the defendant signed the subscription paper the capital of the plaintiff was to be but fifty thousand dollars, and that it was then so written in said subscription paper, and the same was at any time afterwards changed by an interlineation so as to make it read one hundred and fifty thousand dollars, and that the defendant did not know of such change and never assented to the same, then the defendant cannot be required to pay and is exonerated from his subscription, and in such case the verdict should be for the defendant.[67]

§ 463. **Stock illegally issued invalid.**—That under the articles of incorporation the board of directors had no power to increase the capital stock of the company; at least they had no such power at a meeting of which there had been no notice given, and at which all of the directors were not present. Therefore, if you find that no notice was given of the meeting of directors of May 24, 1875, and all of the directors were not present at such meeting, then their action in attempting to increase the capital stock of the company was invalid, and consequently the stock

[66] Koster v. Seney, 100 Iowa, 562, 69 N. W. 868. See, Bell v. Prewitt, 62 Ill. 361.

[67] Hughes v. Antietam Mfg. Co. 34 Md. 319.

issued in excess of the original capital stock of the company was illegally issued and was invalid.[68]

Services Rendered to Public.

§ 464. **Liability of county for physician's services.**—If you find from the evidence that the plaintiff rendered the services stated in the first paragraph of the complaint or any part thereof at the request of the township trustee, and that the person who received the services was a pauper of —— township in Jay County, Indiana, and that there was no physician provided by the board of commissioners of said Jay County, whose duty it was to render said services, then you should find for the plaintiff on the first paragraph of the complaint.[69]

Statute of Limitations.

§ 465. **Reviving a claim barred by statute of limitations.**—(1) In order to take the case out of the statute of limitations and entitle the plaintiff to recover, the jury must find from the evidence that the defendant has, within the last ten years before the commencement of this action, made his promise in writing to pay said note, or that he has actually paid thereon some portion of the principal or interest thereon within the time aforesaid.[70]

(2) If the jury believe from the evidence that some portion of plaintiff's claim for services accrued more than three years before the institution of this suit, then the plaintiff cannot recover for such portion under the pleadings in this cause, unless they shall further find that the defendant or his testatrix promised to pay the same within three years before the bringing of this suit.[71]

(3) If you find there was no understanding or agreement in regard to the credit of the fifteen dollars, then it does not avail as a payment to take this claim out of the statute of limitations to prevent its being barred, because the parties must agree upon

[68] Merrill v. Reaver, 50 Iowa, 404.
[69] Board v. Brewington, 74 Ind. 10. See also Board, &c. v. Galloway, 17 Ind. App. 689, 47 N. E. 390; Ind. Acts, 1901, p. 324, § 6.
[70] Bridgeton v. Jones, 34 Mo. 472.
[71] Bonic v. Maught, 76 Md. 442, 25 Atl. 423.

the payment. The plaintiff cannot, by giving credit upon an account, upon an outlawed bill or a bill that may be outlawed, for the purpose of preventing the running of the statute, make a credit of his own volition on that account, and save the running of the statute. He cannot do it unless it is agreed between the parties that there is to be an application upon the account; and that is a question for you to determine, whether or not it was understood between the parties that such credit was to be made to E, and that it was to be credited upon that account and properly applied upon it. If it was so understood between them it would be a proper application, and the plaintiff might maintain this acton; otherwise he cannot, and that is the question for you to determine.[72]

§ 466. **The promise reviving a discharged claim must be clear and distinct.**—The promise by which a discharged debt is revived must be clear, distinct, and unequivocal. There must be an expression by the defendant of a clear intention to bind himself to the payment of the debt. The new promise must be distinct, unambiguous, and certain. The expression of an intention to pay the debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking or agreement to carry that purpose into effect, and must be express in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt.[73]

§ 467. **Payments on running account—How applied.**—If the jury believe from the evidence that the defendants owed the plaintiffs different debts, and have made several payments to the plaintiffs without designating the debts to which such payments should be applied, then the plaintiffs had the right to make the application of the payments to the debts as they pleased, and if the jury believe from the evidence that neither the plaintiffs nor the defendants made any specific application of the payments to the discharge of any particular debt or debts, the presumption is

[72] Bay City Iron Co. v. Emery, 128 Mich. 506, 87 N. W. 652.

[73] Shockley v. Mills, 71 Ind. 292.

that the first items of a running account, or that the debts which are first in point of time, were to be thereby discharged.[74]

§ 468. **Deed executed and placed in escrow.**—A deed which has been surreptitiously obtained from the grantor without his knowledge or consent does not, as a general rule, transfer title; but a deed made by a grantor and placed in escrow to be delivered to the grantee upon the performance of certain conditions, and which has been obtained from the party in whose possession it was placed by untruthful statements, and afterwards the condition upon which the deed was delivered was performed and the grantee does not demand the possession of the deed nor take any steps to recover the possession of the same, said deed will be effectual to convey the title.[75]

Other Matters.

§ 469. **Rights in contract may be waived.**—If the plaintiffs were not ready on the first day of April, 1881, to comply with their part of the contract, or if the ore was then and there after and until July 15, 1882, being mined and received in less quantities and in a manner otherwise than as the contract provided for, and if the plaintiffs acquiesced therein, or if the plaintiffs during the time did not complain and did not give the defendant reasonable notice that they were standing on their contract, and that he would be expected to receive daily, Sundays excepted, from fifty to sixty tons of ore, then the plaintiffs would not be entitled to recover damages on this account for defendant's failure to receive such amount of ore.[76]

§ 470. **Correspondence constituting contract.**—If the jury believe that the contract between the plaintiff and the defendant consisted of letters and the circular mentioned in the last instruction above, then such contract was a contract in writing and it

[74] Sprague, Warner & Co. v. Hazenwinkle, 53 Ill. 419. See, Snell v. Cottingham, 72 Ill. 124, payment on which matter.

[75] Chicago, I. & E. R. Co. v. Linn, 30 Ind. App. 88, 92, 65 N. E. 552.

[76] Eaves & Collins v. Cherokee Iron Co. 73 Ga. 459.

bears date from the acceptance by the plaintiff of the terms proposed by the defendant in the year 1884.[77]

§ 471. **Written contract cannot be varied by parol proof.**—What the contract was between these parties is to be determined by the writing—the note itself. This is not to be controlled or altered or varied by proof of any parol or verbal agreement or understanding between them at or before the time of signing the note.[78]

§ 472. **Unsigned contract binding.**—The unsigned contract introduced in evidence cannot be regarded as the contract of the defendant, upon which the plaintiff can recover as upon a written contract signed by him. It at the most can only be considered as a part of the transaction at the time of the negotiation and agreement between the parties. If said paper was read over to the defendant accurately and fully and fairly understood by him, and he assented and agreed to the terms therein stated, he is bound by said terms, and his liability will be determined accordingly.[79]

§ 473. **Execution and delivery of deed—Signature.**—(1) Every deed for the conveyance of real estate must be signed by the grantor. This may be done in one of three ways: first, the grantor may sign it in person with his own hand by writing or making his or her mark to his or her name written by another to the deed; second, he may in writing or by parol direct another person in his presence to sign his name to the deed; third, he may, by power of attorney duly executed, authorize another to sign his name to the deed for him either in his presence or absence.[80]

(2) A deed takes effect from its delivery, and until the maker parts with its possession and yields up his right to control it the deed has no legal existence, and no other person can gain any rights under it.[81]

[77] Shrewsbury v. Tufts, 41 W. Va. 216, 23 S. E. 692.

[78] Cook v. Brown, 62 Mich. 478, 29 N. W. 46.

[79] Osborne & Co. v. Simmerson, 73 Iowa, 513, 35 N. W. 615.

[80] Fitzgerald v. Goff, 99 Ind. 39.

[81] Fitzgerald v. Goff, 99 Ind. 40.

CHAPTER XXXVII.

DAMAGES.

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Injury to the Person.

§ 474. Assaulting another in self-defense.—(1) To justify the taking of the life of an assailant when attacked by him there must appear to the satisfaction of the jury, first, that the defendant, if assaulted without any wrong or cause on his part, honestly and truly believed that he was in imminent danger of his life or great bodily harm; and second, if he had just and reasonable cause to apprehend such danger which he could not avoid without taking the life of his adversary. Then it is excusable.[1]

(2) It is not necessary, however, that the danger should be real or in fact existing, for, whether real or apparent, if the circumstances are such as to induce a belief sufficiently well founded that life is in peril or that grievous bodily harm is intended; and to be threatened with danger the accused may act upon appearances and slay his assailant. Yet there must be reasonable ground for his belief in the danger threatened arising out of the circumstances in which he is placed, otherwise the act of taking the life of the assailant is entirely without justification.[2]

(3) If the jury believe that the plaintiff assaulted the defendant and was using a crowbar in a threatening manner, then the defendant had the right to defend himself and to use such force as was necessary to repel such assault.[3]

(4) The court instructs the jury that the defendant was the best judge of what was necessary to defend himself against the attack, and of the means to be used for his own protection. As a technical legal proposition this is undoubtedly correct, and it is true not only as a matter of law, but as a matter of common sense, that the party attacked is obliged, in the very nature of the case, to exercise his best judgment at the time as to what shall be done in his own defense, and his judgment is one which, if honestly exercised, is to a large extent controlling. It would be absolutely controlling unless the jury should find that his exercise of it at the time and under the circumstances was such an exercise as was unreasonable under all the evidence in the case.[4]

[1] Darling v. Williams, 35 Ohio St. 61.

[2] Darling v. Williams, 35 Ohio St. 62.

[3] Ickenroth v. St. Louis Tr. Co. 102 Mo. App. 597, 77 S. W. 163.

[4] Kent v. Cole, 84 Mich. 581, 48 N. W. 168.

(5) If you find from the evidence that the defendant did not assault the plaintiff, but having his pistol in his hand for a lawful purpose and by the negligent of careless handling of the pistol or by accident the pistol was discharged and the plaintiff received an injury, he cannot recover damages for that injury in this action.[5]

§ 475. **Assaulting not in self-defense.**—(1) If the jury believe from the evidence that the defendant had no reasonable cause to apprehend that the deceased intended to take the defendant's life, or to do him any other great bodily harm, and that thereupon the defendant fired the pistol shot in revenge or in a reckless and vindictive spirit, then there is no self-defense in the case and the jury cannot find for the defendant on that ground.[6]

(2) Although you may believe from the evidence that the deceased took hold of the defendant and held him, and may also believe from the evidence that he attempted to follow him, when released with the intention of again taking hold of him, yet that would not justify the defendant in taking his life unless the jury believe from all the evidence before them that the defendant had reasonable cause to believe that the deceased was then about to take his life, or do him some other great personal injury.[7]

(3) If you believe from the evidence that the defendant's conductor struck the plaintiff, then your verdict must be in favor of the plaintiff, unless you further find from the evidence that said conductor struck the plaintiff in self-defense or to save himself from bodily harm.[8]

(4) Abusive language or opprobrious epithets alone never justify the commission of an assault by a conductor in charge of a train upon a passenger.[9]

(5) If the deceased had been wounded and had not died of his wounds and had brought an action against the defendant for damages, if it appeared that the deceased made the first assault and the defendant repelled it by force, employing no more force than was necessary to protect himself, he could not recover; but

[5] Krall v. Lull, 49 Wis. 405, 5 N. W. 874.

[6] Nichols v. Winfrey, 90 Mo. 407, 2 S. W. 305.

[7] Nichols v. Winfrey, 90 Mo. 407, 2 S. W. 305.

[8] Birmingham R. L. & P. Co. v. Mullen (Ala.), 35 So. 702.

[9] Birmingham R. L. & P. Co. v. Mullen (Ala.), 35 So. 702.

if the defendant went unnecessarily beyond this and employed force entirely disproportionate to the attack, such as to show wantonness, malice or revenge, he himself would become a wrongdoer and would be liable for any injury inflicted beyond what was reasonably necessary.[10]

(6) In defending himself against an unlawful attack of another a man is justified in resorting to such violence and the use of such force as the particular circumstances of the case may require for his protection. Now the degree of force to be employed in protecting one's person must be in proportion to the attack made, and must depend upon the circumstances in each particular case, and the imminence of danger as it appears to him at the time. The only purpose which justifies the employment of force against the assault is to defend one's self, that is the object to be attained; and a man is only justified in using such an amount of force as may appear to him at the time to be necessary to accomplish that purpose. As soon as that object is attained, it is his duty to desist. If he used a kind of force towards his assailant in excess or out of proportion to what may be necessary to his own defense, as it honestly appeared to him at the time, he is himself guilty of an assault.[11]

§ 476. **Assessing damages for physical injury.**—If you find for the plaintiff you will award him such damages as will fairly compensate him for any injuries or indignity he may have sustained. In awarding such damages you may consider the character of his injuries, what physical injury, if any, he sustained, and also the mental suffering, if any; also any sense of shame or humiliation he may have suffered on account of such wrongful acts, if any, that were committed against him and award him such damages as will be a fair compensation in the premises.[12]

§ 477. **Damages for assault to ravish.**—If the jury believe from the evidence that the defendant assaulted the plaintiff as testified to by her, by laying his hands on her accompanied with the threat that he would kill her, or words in substance, that if

[10] Darling v. Williams, 35 Ohio St. 58.

[11] Kent v. Cole, 84 Mich. 581, 48 N. W. 168.

[12] Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188, (held not assuming facts and confined the jury to the eivdence. See, Ously v. Hardin, 23 Ill. 353.

she did not consent to sexual intercourse with the defendant, this in itself will warrant the jury in finding the defendant guilty, although the jury may further believe from the evidence that she ultimately freely consented to such intercourse. If, however, the jury believe from the evidence that such ultimate assent was not freely given, but was yielded by the plaintiff only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded by the jury as a part of the assault, and a ground for exemplary damages, that is, such as will compensate the plaintiff for any wrong to her and to punish the defendant, and to furnish an example to deter others from like practices.[13]

§ 478. **Injury to the person by animals.**—(1) The defendant claims that the plaintiff, in passing the bull, provoked the bull to make the attack upon him, by striking the bull with a cane or stick without reasonable cause. If you find that the plaintiff struck the bull, and thereby excited him to make the attack, you will not assume, as a matter of law, that the plaintiff was in fault, but you will inquire whether, under the circumstances, the plaintiff had or had not reasonable cause to strike the bull with his cane. You will carefully notice what the plaintiff did, if anything; his situation at the time as it appeared to him, and all the circumstances surrounding him, and decide whether he acted as a man of ordinary prudence or not.[14]

(2) The plaintiff has alleged in each paragraph of his complaint that the steer in question was of a dangerous and vicious disposition, in the habit of attacking persons and animals. He has also alleged that the defendant knew of such dangerous and vicious disposition of said steer, and that he the plaintiff had no knowledge of such dangerous and vicious disposition. To entitle the plaintiff to recover he must prove, by a fair preponderance of the evidence, not only that the steer was dangerous and vicious, but that the defendant knew that fact and the plaintiff was ignorant of it.[15]

[13] Miller v. Bathasser, 78 Ill. 302, 304. Held competent where no witness except the plaintiff testified to the assault on her.

[14] Meier v. Shrunk, 79 Iowa, 21, 44 N. W. 209.

[15] Todd v. Danner, 17 Ind. App. 368, 46 N. E. 829. In Indiana, by a recent statute, the plaintiff was relieved from the burden of proving his own freedom from contributory negligence in actions for personal injuries. Indianapolis Street R. Co. v. Robinson, 157 Ind. 232, 61 N. E. 197.

§ 479. **Attack by vicious dogs.**—(1) If the defendant had the dog in his possession, and was harboring him on his premises as owners usually harbor their dogs, then he is the owner within the meaning of the law. If the dog was only casually upon his premises, and was not being harbored by defendant as owners usually harbor their dogs, then he was not the owner. In determining how this was at the time of the alleged attack, you will consider the defendant's former treatment of the dog, his declarations concerning him, and the habit of the dog as to staying at the defendant's place, if he was in the habit of staying there.[16]

(2) The fact that the defendant or defendant's wife may have been able to control the dog by calling him off or speaking to him when he would run at any one, even if the jury believe this fact proved, is not such a restraining as is contemplated by the law, and would not relieve or excuse the defendant from the charge of negligence if the other facts in said cause are proved that would require the defendant to restrain his dog.[17]

§ 480. **Dangerous obstructions in highway.**—(1) The way in question was a highway which the defendant was bound to keep in repair, and was liable to the plaintiff if he was injured by a defect in it while he was traveling over it and using due care. The defendant had a right to repair the road and to put the mound of earth where it was for that purpose, but would be bound to fence or guard it in some manner so as to prevent travelers from injury by means of it. The defendant could protect travelers from injury and the town from liability in either of two ways: first, by placing and keeping a sufficient guard or barrier at the place where the mound was, so as to keep travelers away from it; second, by placing and keeping a suitable and sufficient fence or barrier across the highway at the end of the part that was being constructed, so as to notify travelers that the way was not for use and to prevent the using of it. If the defendant placed a proper and sufficient fence or barrier across the way at the east end, the direction the plaintiff came, sufficient and suitable to notify a person of ordinary prudence that the way was not for use, and such fence

[16] O'Hara v. Miller, 64 Iowa, 462, 20 N. W. 760.

[17] Dockerty v. Hutson, 125 Ind. 102, 25 N. E. 144.

or barrier was there in place at the close of the day of the accident the defendant would not be liable. It is for the jury to say whether the fence which was placed across the way at the east end was suitable and sufficient. If the town attempted to close the whole road by barriers, and knew or had reason to know that those barriers had been constantly and repeatedly taken down or left down, that knowledge is to be considered by the jury in determining whether the defendant's precautions were such as were reasonable.[18]

(2) The county commissioners were bound to foresee and reasonably provide against a common danger to ordinary travel on the bridge. It may be taken as a well known fact that when bicycles strike obstructions in their path, even though in the control of expert riders, they are apt to deviate from their course and take a sudden and erratic direction, unexpected by the riders, just as no one can foretell the conduct of a frightened horse. The presence of guard rails or barriers at the point of the accident would have been a protection from the danger of going over the bridge, no matter what the movements of a bicycle would be. The aptness of bicycles to deviate from their course and to take sudden and unexpected direction when meeting obstructions in their path was ordinary knowledge and to be expected. If it were otherwise, it would be extraordinary, because contrary to common observation and experience. The county commissioners should have guarded against that which was to be expected, and it will not excuse the negligence of the commissioners, or make that negligence the remote cause to assert that they could not foresee the peculiar aptness or freak of a bicycle to take sudden and unexpected courses when meeting obstacles in its path. The injury in the case must be the natural and probable consequence of the neglect to have had up guards or barriers, and the consequence is such as, under the surrounding circumstances of this case, might and ought to have been foreseen by the county commissioners.[19]

§ 481. Turnpike unsafe—Liability.—(1) If the jury believe from the evidence that defendant corporation owned and kept

[18] Howard v. Inhabitants, 117 Mass. 588.

[19] Strader v. Monroe, 202 Pa. St. 626, 51 Atl. 1100. But see Board, &c. v. Allman, 142 Ind. 573, 42 N. E. 206; Town of Boswell v. Wakley, 149 Ind. 64, 48 N. E. 637.

open for public travel the turnpike road spoken of in evidence, then it was the duty of defendant to make its said road in such manner and in such condition as to make it safe for persons traveling over the same, using ordinary care and caution while so traveling; and if they shall further find that the defendant negligently permitted a part of its road to be in an unsafe and perilous condition for persons using the same with ordinary care and caution, and that G, while traveling over said road and said part and using ordinary care and caution, was injured by the upsetting of the vehicle in which he was traveling, as described in the evidence, and shall further find that the said accident was caused by the negligence of the defendant corporation in having its said road in an unsafe and perilous condition for public travel at the place of accident, and not by any negligence of the said G directly contributing thereto, then the plaintiff is entitled to recover.[20]

(2) The burden of proof is on the plaintiff to show that the injury complained of was caused by the defendant's negligence, and that but for such negligence the injury would not have happened; and further, that unless the jury should find from the preponderance of the testimony that the death of G was caused solely by the defendant's negligence, the plaintiff was not entitled to recover.[21]

§ 482. Injury to bicyclist on bridge.—(1) Should you believe from the evidence that the plaintiff was not expert, or was inexperienced in the use of the wheel, yet she had a legal right to use the bridge in question with her wheel, and it was the duty of the county commissioners to have anticipated such use and provided for the same, and their failure to do so was negligence, and the plaintiff is entitled to recover, provided she was not guilty of contributory negligence.[22]

(2) It is the law of this state that persons using bicycles on the public highways and bridges are entitled to the same rights and subject to the same restrictions in the use thereof as are prescribed by the law in the case of persons using carriages drawn by horses.[23]

[20] President, &c. v. S. 71 Md. 576, 18 Atl. 884.

[21] President, &c. v. S. 71 Md. 581, 18 Atl. 884.

[22] Strader v. Monroe, 202 Pa. St. 627, 51 Atl. 1100; See City of Logansport v. Kihm, 159 Ind. 68, 64 N. E. 595.

[23] Strader v. Monroe, 202 Pa. St. 627, 51 Atl. 1100.

(3) The plaintiff in the use of her bicycle on the bridge in question was not bound to use the carriage drive, but had the right to go over any part of the bridge open for travel.[24]

(4) If the plaintiff knew of the existence of the obstruction, the plank on the bridge, or saw it before she reached it, or was careless in not observing it, and then carelessly or imprudently ran into it or on it and the accident resulted from such carelessness and imprudence, then she cannot recover. She must show you that she was reasonably careful and prudent as she rode across the bridge at the point of the accident. She must satisfy you of that first. If she has done so, then you may proceed to the second question.[25]

§ 483. Accidental injury to traveler on highway.—(1) If the jury shall find that the turnpike road of the defendant at the place in question was reasonably safe and fit to be driven upon with a team of horses which were ordinarily gentle and manageable, and that one of the horses of the deceased was frightened at an object which would not ordinarily have frightened a gentle and well-broken horse, and that in consequence of which the horse got beyond the control of the deceased and that the wagon was upset and the death of G was caused by his loss of control over said horse, then the verdict must be for the defendant.[26]

(2) The owner or driver of the horse being driven along the highway is not responsible for the consequences of his horse running away or for injuries inflicted while the horses were out of his control, provided he has used reasonable care in driving and controlling them. The horses and truck of the defendant were being lawfully used upon the highway at the time of the collision with plaintiff's buggy; and if the collision occurred while the driver had temporarily lost control of the horse by reason thereof, if you should find that he was thrown from the truck in the manner that he has described, but if his loss of control was not the result of want of care on his part, the

[24] Strader v. Monroe, 202 Pa. St. 627, 51 Atl. 1100.

[25] Strader v. Monroe, 202 Pa. St. 626, 51 Atl. 1100. The burden of disproving his own contributory negligence, does not rest on the plaintiff in actions for personal injuries in Indiana: Indianapolis Street R. Co. v. Robinson, 157 Ind. 232, 61 N. E. 197.

[26] President, &c. v. S. 71 Md. 581, 18 Atl. 884.

collision must be regarded as accidental, and the plaintiff could not, under those circumstances, recover.[27]

Malpractice by Physician.

§ 484. **Negligence of doctor—Liability.**—(1) If the jury believe from the evidence in this case that the plaintiff, having broken his leg, employed the defendant as his physician and surgeon, to set and attend the same, and that the defendant, holding himself out as a physician and surgeon, undertook and entered upon such employment, and for a considerable time had charge of the same, then the plaintiff was entitled to receive the care, attention and skill of an ordinarily skilled physician and surgeon. And if, from the evidence in the case, the jury believe that the plaintiff did not receive from the defendant such care, attention and skill, and that in consequence of not receiving the same, and without fault on his part, suffered increased pain, suffering and injury, then the jury are instructed that the defendant is liable, and the jury will render a verdict for the plaintiff, and assess his damages, as found from all the evidence in the case, at some amount not exceeding the sum of three thousand dollars claimed by the plaintiff in his declaration.[28]

(2) If you find from the evidence that the defendant put the plaintiff's leg in proper place and dressed it, you should inquire what means, if any, were used by him to keep it in place and to guard against the effects of the ordinary and natural movements of the plaintiff and his muscles in his then condition; and whether the responsibility of not providing such safeguards as were necessary and proper in the case rests with the defendant. You should also consider what directions or instructions, if any, were given by the defendant, or whether any directions or instructions were given, as to the necessity of remaining quiet and not moving, or the dangerous results likely to follow from undue motion. The responsibility for not giving such instructions and directions as were necessary and proper rests

[27] Silsby v. Michigan Car Co. 95 Mich. 207, 54 N. W. 761. See Holliday v. Gardner, 27 Ind. App. 231, 59 N. E. 686, 61 N. E. 16.

[28] Kendall v. Brown, 86 Ill. 388.

with the defendant, and if such directions and instructions were necessary and proper, and he failed and neglected to give them, you will be justified in considering such failure as negligence and want of proper care and attention.[29]

§ 485. Physician required to exercise ordinary skill.—A surgeon in the treatment of a fractured limb is not required to have an infallible judgment or perfect skill. If he is possessed of ordinary knowledge and skill, and exercises them to the best of his ability, he is not bound to warrant his judgment. Acting in good faith, a physician or surgeon, possessed of reasonable or ordinary skill, may do an act or adopt a treatment which may do harm or produce a bad result, yet if done in good faith and in the exercise of ordinary knowledge and skill he would not be liable.[30]

§ 486. Patient must observe directions of doctor.—If you find that the injuries of which the plaintiff complains were caused wholly or in part by his own acts or negligence, then he cannot recover. It is the duty of the patient to observe and follow the reasonable directions of his physician and surgeon. If the plaintiff, after having been treated for some time by the defendant, upon going away from the place where the treatment had been given was instructed by the defendant to return for further treatment as soon as he began to suffer pain, and that, although he suffered pain, he neglected for a week to return for treatment, this is a fact for you to take into consideration, with the other facts in the case, in determining whether the plaintiff himself was or was not negligent.[31]

Unlawful Sale of Liquor.

§ 487. Liability for selling intoxicating liquors.—(1) It is unlawful and punishable for any person to furnish any intoxicating liquors to one who is intoxicated or who is in the habit of getting intoxicated at the time of so furnishing such liquors,

[29] Wallace v. Ransdell, 90 Ind. 173, (held proper when taken in connection with other instructions given.)

[30] Jones v. Angell, 95 Ind. 382.

[31] Jones v. Angell, 95 Ind. 380.

unless given by a physician in the regular course of his practice.[32]

(2) The amount of a sale is not material, nor is it material that the sale should be the one which produced the final intoxication; but the saloon-keeper or the person furnishing intoxicating liquors is responsible for all damages which may accrue as the result of his sales, if a person obtains but one drink and then drinks at other places sufficient to intoxicate him. And, if the death is established as a result of sales by more than one person, you are not required to find which one furnished the liquor that caused the death.[33]

(3) If the jury believe from the evidence that the said C was intoxicated at the time he upset and overturned his sled and lost his team, and that the defendants sold any part of the liquors that produced such intoxication, and that he upset his sled and lost his team in consequence of such intoxication, and that in endeavoring to reach home on foot he became exhausted, and that such exhaustion was caused by reason of his being compelled to walk, and that he was unable to reach home and was frozen to death, the defendants would be liable.[34]

(4) If you should find from the evidence that the deceased came to his death by violence inflicted by any other person, and should further find that the person inflicting the violence was intoxicated at the time, and that he obtained from the defendants or either of them the liquors which caused his intoxication, and that he would not have used the violence that caused the death except as a result of such intoxication, then, and in that case, such of the defendants and their bondsmen as furnished such intoxicating liquors would be equally liable.[35]

§ 488. **Wife—Selling to her husband—Liability.**—(1) In a suit brought by a wife or widow to recover for an injury to her means of support, caused by the intoxication of her husband, produced, in whole or in part, by intoxicating liquors sold or given to him by the defendant or defendants (if such facts are shown by

[32] Sibila v. Bahnez, 34 Ohio St. 399.

[33] Scott v. Chope, 33 Neb. 75, 49 N. W. 940. See Kearney v. Fitzgeral, 43 Iowa, 582; Jokers v. Borgman, 29 Kas. 109; Smiser v. S. 17 Ind. App. 519, 47 N. E. 229.

[34] Scott v. Chope, 33 Neb. 76, 49 N. W. 940.

[35] Scott v. Chope, 33 Neb. 74, 49 N. W. 940.

the evidence), if it further appears, from the evidence, that in consequence of such act of causing such intoxication, and as a proximate result or consequence of such intoxication so caused, she has sustained actual and real damages to her means of support, then the jury may, in addition to the actual damages shown, give exemplary or vindictive damages, unless it shall further appear, from the evidence, that such liquor was sold or given to the husband, not by the defendants, but by their agents or servants, and that the defendant or defendants had forbidden his or their said agent or agents to sell or give such liquor to said husband, and did not know of or permit such sale or gift when made, in which case the defendants would not be liable to exemplary or vindictive damages.[36]

(2) The law requires that a husband shall provide for his wife reasonable support according to her rank and station in society; and to this end she is entitled with her husband and family to share his property and the proceeds of his labor.[37]

§ 489. Transfer of liquor license—Effect.—(1) An individual or partnership taking out a license for the sale of intoxicating liquors cannot sell and transfer that license to another person or party, and if they do sell and transfer their business, together with their rights under the license, the purchaser would be holden to their agent, and they would be liable for all sales made by him under and by virtue of such license. And if the bondsmen of such license holder knew of such sale and transfer, and took no steps to relieve themselves from liability, their liability will continue.[38]

(2) It would be the duty of a person going out of the saloon business, selling and transferring his property, to return his license under which he was transacting business to the authority granting the license and have the same canceled, and if he did not do this, that he would be held liable for all damages accruing as the result of the sales of intoxicating liquors by his successor in business.[39]

[36] Betting v. Hobbett, 142 Ill. 76, 30 N. E. 1048. But see State v. Knotts, 24 Ind. App. 477, 56 N. E. 941.

[37] Thill v. Pohlman, 76 Iowa, 639, 41 N. W. 385.

[38] Scott v. Chope, 33 Neb. 75, 49 N. W. 940. License not transferable: Pierce v. Pierce, 17 Ind. App. 107, 46 N. E. 486.

[39] Scott v. Chope, 33 Neb. 75, 49 N. W. 940.

§ 490. **Sales since commencing suit—Evidence.**—If you find from the evidence that since the commencement of this suit the defendant has sold intoxicating liquors to G in violation of law, that would afford no ground whatever for a recovery on the part of the plaintiff; but if you find that the plaintiff ought to recover on account of intoxicating liquors having been sold to G, her husband, by the defendant for the four years previous to the time of beginning this suit, you have a right to consider the fact, if it is a fact, that it has been repeated and the unlawful sales made since its commencement, for the purpose of throwing light upon the mind of the defendant at the time he sold such liquors to the said G during the four years prior to the plaintiff's filing her petition; you have a right to consider it in aggravation of her damages, or as a reason why they should or may be increased. You cannot found her right to recover upon any such sales, but the most you can do would be to increase the amount of her recovery by way of exemplary damages for such sales, if she is otherwise entitled to a verdict.[40]

Libel and Slander.

§ 491. **Libel and slander defined.**—(1) Libel is defined by our statute, so far as applicable to this case, as the malicious defamation of a person, made public by any printing or writing tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.[41]

(2) Slander may be defined to be the false, wilful and malicious speaking or publishing by another of any defamatory words, charging him with being guilty of a felony or crime.[42]

§ 492. **Malice an essential element.**—(1) Malice is essential to the support of an action for slanderous words; but if one falsely, wrongfully and wilfully charges another with a felony, the law will imply malice until the contrary is shown.[43]

(2) If in this case the jury find that defendant spoke the slan-

[40] Bean v. Green, 33 Ohio St. 457.
[41] Dever v. Clark, 44 Kas. 752, 25 Pac. 205.
[42] Slallings v. Newman, 26 Ala. 303.
[43] Slallings v. Newman, 26 Ala. 303.

derous words as charged in the second and third counts of plaintiff's petition, then the law presumes they were spoken maliciously, and it is not necessary to prove any express malice in order to warrant a verdict for the plaintiff.[44]

(3) If you find that the information was made and filed without probable cause, or without honestly believing that the statements therein were true, but was done to injure the plaintiff in his good name and reputation, or for some advantage over him, then the law would imply malice, and you should find for the plaintiff.[45]

§ 493. **Slanderer's words must be proved.**—(1) In this action, to authorize the plaintiff to recover, it is necessary for him to prove that the defendant maliciously and falsely spoke of and concerning the plaintiff, the words charged in his declaration, or some of them; and when plaintiff proves, to the satisfaction of the jury, that defendant falsely and maliciously spoke or uttered of and concerning plaintiff, the words charged in the declaration, then he may recover such damages as he has sustained.[46]

(2) If you find from a preponderance of the evidence that the defendant spoke the words, in substance, as alleged in the complaint, that he intended in the use of said words to say and charge that the plaintiff had been guilty of the crime of larceny, and that said words were spoken maliciously and in the presence of some person other than the plaintiff, then you should find for the plaintiff.[47]

(3) The jury are the sole judges as to whether the article complained of is libelous.[48]

§ 494. **Proof of part of words may be sufficient.**—(1) All the words laid in the plaintiff's declaration need not be proved to maintain the action, unless it takes them all to constitute the slander, and if the jury believe from the evidence that a sufficient number of the words laid in the declaration to amount in their common acceptation to a charge of fornication against

[44] Lewis v. McDonald, 82 Mo. 582.

[45] Comfort v. Young, 100 Iowa, 629, 69 N. W. 1032.

[46] Stallings v. Newman, 26 Ala. 303.

[47] Durrah v. Stillwell, 59 Ind. 142, (held not objectionable as conveying the idea that other words with the same meaning would be sufficient.)

[48] McCloskey v. Pulitzer Pub. Co. 152 Mo. 346, 53 S. W. 1087. But see Alcorn v. Bass, 17 Ind. App. 500.

the plaintiff have been proved to have been spoken by the defendant, B, then they must find for the plaintiff.[49]

(2) If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff in the presence and hearing of T, or others as mentioned, the words in the petition alleged, to wit: "T killed my hogs, and I can prove it, and he is the biggest thief on this creek, and I can prove by M and his boys that he has stolen my hogs;" or that enough of the words stated in the petition have been proved to (substantially) constitute the charge imputed to plaintiff, then the jury must find for the plaintiff.[50]

(3) The plaintiffs are not bound to prove the speaking of the words charged in the petition. If the jury believe from the evidence that the defendant spoke of and concerning the plaintiff, in the presence and hearing of others, any of the slanderous words charged in the petition, the fair import of which would be to charge the plaintiff with being a whore, then she is entitled to a verdict.[51]

(4) The defendant is charged by plaintiff with speaking of plaintiff the following words: "T killed my hogs, and I can prove it; he is the biggest thief on this creek, and I can prove it by M. and his boys that he has stolen my hogs;" and with speaking of plaintiff the following words: "T's water gates were traps to steal other people's stock in;" and unless they believe from the evidence that defendant spoke of plaintiff the said words, or so much of the said words as may be sufficient to constitute a charge that plaintiff stole hogs, or was a hog thief, they must find the issue in this cause for the defendant.[52]

§ **495. Words libelous in themselves.**—(1) To print and publish concerning any person that he has been a convict in the state penitentiary of the state of Kansas, is libelous per se, unless the same is true; and in this connection you are instructed that there was no attempt on the part of the defendant in this case to prove the truth of the matter charged as libelous, or to show that the same was published for justifiable ends.[53]

[49] Baker v. Young, 44 Ill. 43.
[50] Lewis v. McDaniel, 82 Mo. 583.
[51] Boldt v. Budwig, 19 Neb. 742, 28 N. W. 280.
[52] Lewis v. McDaniels, 82 Mo. 583.
[53] S. v. Brady, 44 Kas. 436, 24 Pac. 948.

(2) Words charging a woman with being a whore are actionable in themselves, and the law presumes that a party uttering them intended maliciously to injure the person against whom they are spoken, unless the contrary appears from the circumstances, occasion or manner of the speaking of the words; but all that the plaintiffs are bound to prove in the case to entitle them to recover is the speaking by the defendant of enough of the slanderous words charged in the petition to amount to a charge that the plaintiff was a whore, and express malice or ill will need not be proved; but if the jury believe from the evidence that plaintiff has failed to prove enough of the words to amount to a charge that plaintiff was a whore, then plaintiff cannot recover, and your verdict should be for the defendant.[54]

(3) Although the plaintiff alleges in his petition that he has, on account of the publications complained of, sustained a damage of one thousand dollars on account of each of said publications, it is not necessary for him to prove any specific damage; for the law presumes that his official duties as a public officer were honestly performed, and his professional obligations properly discharged; and an article which tends to hold him up to the public view as an unskilled lawyer and an incompetent officer, is libelous per se (per se meaning of itself), and entitles the plaintiff to damages, unless the defendant establishes the truth of said publication by a preponderance of the evidence.[55]

(4) Both of the articles complained of by the plaintiff in his petition, copies of which articles are attached to said petition, are libelous in themselves, and unless the defendant proves them to be true, by a preponderance of the evidence, then the plaintiff would be entitled to recover such damages as he has sustained by the publication of said articles.[56]

§ 496. Charging another with committing a crime.—(1) To charge one of murder in killing another is actionable and slanderous, and, falsely and maliciously spoken, warrants a recovery of such damages as the jury may think the party has sustained, commensurate with the injury sustained.[57]

[54] Boldt v. Budwig, 19 Neb. 743, 28 N. W. 280.

[55] Dever v. Clark, 44 Kas. 753, 25 Pac. 205.

[56] Dever v. Clark, 44 Kas. 752, 25 Pac. 205.

[57] Stallings v. Newman, 26 Ala. 303.

(2) The plaintiff did not commit the crime of larceny in taking this ice, and no one now claims in this case that he did. And if defendant's language used on the occasion complained of, taken as a whole and all of it, did not, according to its fair meaning under the circumstances, charge plaintiff with larceny, or if the hearers did not understand that it charged him with larceny, but that it simply charged him with doing some unfair or improper or dishonest thing, not amounting to larceny, as the hearers understood it, then defendant is not guilty, for then he would not charge the plaintiff with crime, and the charge of crime is the gist of the alleged slander.[58]

(3) If the language of the defendant under the circumstances did not charge the plaintiff with larceny, and if none of the hearers understood it as charging him with larceny, then the defendant is not guilty.[59]

§ 497. **Publication—Letter so held.**—If the jury believe from the evidence that on the eighth day of February, 1899, the witness W, was in the employ of the defendant as a stenographer and typewriter in the office and business of the defendant, and on said day said defendant dictated to the witness, W, the typewritten words and figures in the letter of date of February 8, and set out in the first count of the declaration and offered in evidence, and that said witness, W, took down said dictation in shorthand characters upon paper, and thereafter and on the same day copied the same upon a typewriting machine upon the business paper of the defendant, and in the form and maning appearing in said letter offered in evidence, and after said letter was thus typewritten the defendant subscribed his name thereto in his proper handwriting, and thereafter said letter was copied by a letter-press machine into the letter book of the defendant by the witness, W, in the course of her said employment in the business of the defendant, then such action in law constitutes a writing and publication by said defendant of the matters and things appearing in said letter, and if the jury further find that the person therein mentioned and referred to is the

[58] Ellis v. Whitehead, 95 Mich. 115, 54 N. W. 752.

[59] Ellis v. Whitehead, 95 Mich. 115, 54 N. W. 752.

plaintiff, then the plaintiff is entitled to recover under the first count of the declaration.[60]

§ 498. **Measure of damages—Considerations.**—(1) If from the evidence and the instructions of the court the jury find for the plaintiffs, then the jury are to determine from all the evidence and the circumstances as proved on the trial what damages ought to be given to the plaintiff, and find their verdict accordingly, but not exceeding the amount claimed. In finding the measure of damages the jury may take into consideration the mental suffering produced, if any, by the uttering of the slanderous words, if they believe from the evidence that such suffering has been endured by the plaintiff, and the present or probable future injury, if any, to the plaintiff's character, which the uttering of the words was calculated to inflict. If you find for the plaintiff, she will be entitled to at least nominal damages without proof of actual damages.[61]

(2) If the jury find from the evidence that the defendant, P., uttered the words as set forth in the plaintiff's declaration, then in estimating the amount of damages they may take into consideration all the attending facts and circumstances under which the defendant made such utterance, in mitigation of the damages, and further, that in estimating the damages the jury may consider the degree of malice on the part of the said defendant.[62]

§ 499. **Punitive damages—When proper.**—(1) If the jury believe from the evidence that the defendant is guilty of uttering the slanderous words charged in the plaintiff's declaration, they may take into consideration the pecuniary circumstances of the defendant and his position and influence in society in estimating the amount of damages; and if they shall also find from the evidence that the defendant obtruded himself into the plaintiff's house and there offered undue familiarities to the plaintiff's wife, at the time and on the occasion of the uttering of the words in question, there circumstances may also be taken into consideration in fixing the amount of damages, and the jury, in

[60] Gambrill v. Schooley, 93 Md. 49, 48 Atl. 730.

[61] Boldt v. Budwig, 19 Neb. 743, 28 N. W. 280.

[62] Padgett v. Sweeting, 65 Md. 405, 4 Atl. 887.

their discretion, may give damages by way of punishment to the defendant, proportioned to the circumstances in evidence as well as for compensation.[63]

(2) In actions for slander the law implies damages from the speaking of actionable words, and also that the defendant intended the injury which the slander is calculated to effect, and in case the jury find a verdict of guilty, they are to determine from all the facts and circumstances in the case what damages ought to be given, and are not confined to mere pecuniary loss or injury.[64]

(3) If the defendant published the paper in manner and form as alleged, and injury resulted to the plaintiff from and by reason of such publication, he will be entitled to recover such damages as he has directly sustained; and in estimating compensatory damages you may take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action. If the publication was made with a bad motive or wicked intention, you may go beyond mere compensation and award vindictive or punitive damages—that is, damages by way of punishment.[65]

§ 500. **Matters in mitigation.**—(1) Anger is no justification for the use of slanderous words, and it ought not to be considered even in mitigation of damages, unless the anger is provoked by the person against whom the slanderous words were used, and in this case, if the jury believe from the evidence that the defendant, B, spoke of the plaintiff any of the slanderous words charged in the petition, then it matters not who commenced the conversation, and that the defendant was angry at the time, unless her anger was wrongfully provoked in whole or in part by the acts or language of the plaintiff herself.[66]

(2) Evidence introduced under a plea of justification charging the plaintiff with having committed a crime, tending to prove his guilt, but not establishing his guilt beyond a reasonable doubt, cannot constitute a complete defense and bar to the action, but may be considered in mitigation of damages.[67]

[63] Hosley v. Brooks, 20 Ill. 117.

[64] Baker v. Young, 44 Ill. 44, (held not assuming the guilt of the defendant.)

[65] Finney v. Smith, 31 Ohio St. 529.

[66] Boldt v. Budwig, 14 Neb. 743, 28 N. W. 280.

[67] Tucker v. Call, 45 Ind. 31. By a recent Indiana statute the rule that an answer in justification must be proved beyond a reason-

(3) If defendant at the time he spoke the words complained of stated that he had heard such a report from others and gave it as a matter of rumor, and he has proved that he heard it, then while it would not amount to a justification, for no one has a right, even through idle wantonness, to keep a slanderous report afloat against another, yet it may be considered as tending to show that he did not originate the story in malice, and given its due weight in mitigation of damages.[68]

(4) For the purpose of rebutting and repelling the idea of malice, the defendant has the right to prove and explain all the facts and circumstances surrounding the speaking of the words; also, he has the right to show and explain all the facts and circumstances surrounding the speaking of the words in mitigation of damages.[69]

(5) In this case there is no justification pleaded, but only a general denial and a plea of mitigation, and the publication is admitted in the pleadings. Under the evidence and the pleadings the defendant can only mitigate the damages.[70]

§ **501. Good faith—Probable cause.**—(1) If the jury believe from the evidence that the libelous matter, complained of by the plaintiff, was composed and published in the due course of judicial procedure by the defendants, and that said defendants had reasonable cause for belief, and did actually believe, that the said matter was pertinent to the case they sought to make, and the relief they prayed for, then the jury will find for the defendants.[71]

(2) The real question for you to determine first in this case is, was the information made by the defendant and filed by him honestly and in good faith, upon probable cause, he believing at the time that the plaintiff was insane, or laboring under an insane delusion, and was the act done for a laudable purpose, to protect himself, his property or society? And if you find from the preponderance of the credible evidence in the case that it was so done, then your verdict should be for the defendant.[72]

able doubt is abrogated in Indiana, and proof by a preponderance of the evidence is now sufficient. Acts 1897, p. 137, Burns' R. S. 1901 (Ind.), § 376c.

[68] Hinkle v. Davenport, 38 Iowa, 364.

[69] Slallings v. Newman, 26 Ala. 304.

[70] Jones v. Murray, 167 Mo. 49, 66 S. W. 981.

[71] Johnson v. Brown, 13 W. Va. 91.

[72] Comfort v. Young, 100 Iowa, 629, 69 N. W. 1032.

§ 502. **Degree of proof in justification.**—(1) The testimony, to sustain the plea of justification, should be as certain and conclusive as would be required to justify a conviction for the larceny, if the plaintiff were indicted for the offense—such as leaves no doubt in the minds of the jury of the truth of the charge.[73]

Malicious Prosecution.

§ 503. **Arrest without a warrant.**—(1) It is the duty of a sheriff on arresting a person without a warrant for an offense committed within his view, or when he arrests a person without a warrant upon information when he has reasonable or probable cause to believe that such person has committed a felony, in either case without delay, and as soon as he can reasonably do so, to take the person whom he has placed under arrest before some magistrate to be charged by affidavit with some offense. Such an arrest can only be made and the person held for such purpose. If the officer shall fail to take the person so arrested before a magistrate as required by law, then he is liable to such person in an action for damages.[74]

(2) No officer is justified in making an arrest without a warrant when the person whom he arrests is peaceable and not engaged in open violence, as, for example, by fighting, engaging in a riot, or about to escape after committing a felony.[75]

(3) This is an action commenced by the plaintiff against the defendant for the illegal arrest of the plaintiff by the defendant under circumstances of aggravation as alleged by the plaintiff. Under the laws of this state, no civil officer has the right to arrest a citizen unless he has a warrant, and if demand be made, to exhibit it; or unless some offense against the criminal law is being committed by the person arrested in the presence of the officer.[76]

(4) The law does not look with favor on arrests made without a warrant, and an arrest without a warrant cannot be justified if the person arrested was not engaged in a breach of the peace,

[73] Wonderly v. Nokes, 8 Blackf. (Ind.) 589. See ante § 500, n. 67.

[74] Harness v. Steele, 159 Ind. 293, 64 N. E. 875.

[75] Pinkerton v. Verberg, 78 Mich. 580, 44 N. W. 579.

[76] Hall v. O'Malley, 49 Tex. 70.

as, for example, in fighting, or in a riot, or about to escape after having committed a felony.[77]

(5) It is no defense that the sheriff supposed he had a capias; nor had he any right to know there was an indictment for a misdemeanor or any other indictment against M, the plaintiff. Until a capias was issued and placed in his hands, he had no right to arrest M, nor in any manner to molest him, because there may have been an indictment, if there was one.[78]

(6) If the jury shall find that the plaintiff was at the time she was arrested walking on the street without molesting any one, then she was not committing any act that would justify the defendant in arresting her without a warrant, and his act in arresting her was unjustifiable, and the burden is on him to justify the act.[79]

(7) If the jury shall find that the plaintiff, at the time she was arrested by the defendant, was conducting herself in an orderly manner, and not committing any breach of the peace, then the defendant had no right or authority to arrest her.[80]

§ 504. **Probable cause for prosecution.**—(1) The court further instructs the jury, that to constitute a probable cause for a criminal prosecution there must be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.[81]

(2) If the jury believe from all the facts and circumstances as given in evidence that the defendant had not a probable cause for the prosecution of the plaintiff, they may infer malice from such want of probable cause.[82]

(3) Though probable cause cannot be inferred from malice, yet in determining whether there was or was not probable cause, the fact, if such is the fact, that there was ill will or malice, may be considered.[83]

(4) If the jury believe from the evidence that the defendant

[77] Pinkerton v. Verberg, 78 Mich. 580, 44 N. W. 579.
[78] Hall v. O'Malley, 49 Tex. 70.
[79] Pinkerton v. Verberg, 78 Mich. 580, 44 N. W. 579.
[80] Pinkerton v. Verberg, 78 Mich. 580, 44 N. W. 579.
[81] Chapman v. Cawrey, 50 Ill. 517.
[82] Chapman v. Cawry, 50 Ill. 517; Ray v. Goings, 112 Ill. 662.
[83] Evansville & T. H. R. Co. v. Talbot, 131 Ind. 223, 29 N. E. 1134.

maliciously caused the arrest and imprisonment of the plaintiff without a probable cause, as alleged in the plaintiff's declaration, they will find for the plaintiff, and may assess his damages at such sum as they may think proper, from the facts or circumstances of the case, not exceeding the sum of five thousand dollars.[84]

(5) If the jury believe from the evidence that the defendant had probable cause to institute the criminal proceedings against the plaintiff, then the plaintiff cannot recover. Probable cause is defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense of which he is charged.[85]

(6) The burden of proof in this case is upon the plaintiff to show that the defendant, in instituting the prosecution before a justice of the peace, for malicious mischief, acted without probable cause, and if they believe, from the evidence, that the plaintiff has failed to show a want of such probable cause by a preponderance of the evidence, then the jury will find for the defendant.[86]

(7) If the jury believe from the evidence that the defendant honestly believed that the plaintiff had committed a crime, breach of the peace, or misdemeanor, or had threatened to commit a crime, misdemeanor or breach of the peace, and if the defendant's belief was founded on circumstances tending to show that he had committed, or was about to commit such offense, such belief, so founded, negatives the idea of want of probable cause for the prosecution, and the jury will find for the defendant.[87]

§ 505. Unlawful arrest—Liability.—(1) The defendants acting as a board of police commissioners, or a majority thereof, had no right to order the arrest of the plaintiff for publicly wearing the uniform and badge prescribed by said board for the police force.[88]

(2) If the jury shall believe from the evidence that the defendants, whether acting as the board of police commissioners or as individuals did issue an order for the arrest of the plaintiff for so

[84] Chapman v. Cawrey, 50 Ill. 517.
[85] Calif v. Thomas, 81 Ill. 486.
[86] Calif v. Thomas, 81 Ill. 486.
[87] Chapman v. Cawrey, 50 Ill. 518.
[88] Bolton v. Vellines, 94 Va. 399, 26 S. E. 847.

wearing such uniform, and that because of such order, so issued, the said plaintiff was arrested and imprisoned, then they must find for the plaintiff.[89]

(3) If the jury believe from the evidence that the plaintiff has not committed any offense alleged in the defendant's pleas, and that both the defendants concurred in laying hands on him and arresting him, then the jury are instructed that they should find both defendants guilty, and assess the plaintiff's damages.[90]

(4) If one merely announces his intention of arresting a person, such person is not justified in shooting him, although the former's official character is not known to the latter, and although, in fact, the arrest would be unwarrantable.[91]

§ 506. Advice of counsel as a defense.—(1) Before the defendant can shield himself by the advice of counsel, it must appear from the evidence that he made in good faith a full, fair and honest statement of all the material circumstances bearing upon the supposed guilt of the plaintiff which were within the knowledge of the defendant, or which the defendant could, by the exercise of ordinary care, have obtained, to a respectable attorney in good standing, and that the defendant in good faith acted upon the advice of said attorney in instituting and carrying on the prosecution against the plaintiff.[92]

(2) The burden of proof is upon the defendant to prove that he sought counsel with an honest purpose to be informed as to the law, and that he was in good faith guided by such advice in causing the arrest of the plaintiff, and that whether or not the defendant did, before instituting the criminal proceedings, make a full, correct and honest disclosure to his attorney or attorneys of all the material facts bearing upon the guilt of the plaintiff of which he had knowledge, and whether, in commencing such proceedings, the defendant was acting in good faith upon the advice of his counsel are questions of fact to be determined by the jury from all the evidence and circumstances proved in the case. And if the jury believe from the evidence that the defendant did not make a full, correct and honest disclosure of all such facts to

[89] Bolton v. Vellines, 94 Va. 399, 26 S. E. 847.

[90] Mullin v. Spangenberg, 112 Ill. 140.

[91] Keady v. P. (Colo.), 77 Pac. 895.

[92] Roy v. Goings, 112 Ill. 663.

his counsel, but that he instituted the criminal prosecution from a fixed determination of his own, rather than from the opinion of counsel, then such advice can avail nothing in this suit.[93]

(3) If the defendant consulted counsel as a means of covering malice, and did not believe the advice given him, or that the plaintiff was guilty of the crime charged against him, but commenced the prosecution as a means to get rid of the liability on the note in question, then the fact that he consulted counsel cannot avail him.[94]

(4) If you believe from the evidence that the defendant consulted an attorney, and made a full and fair representation to him of the facts; that said attorney advised the prosecution, and that the defendant acted in good faith on such advice, then you should find for the defendant.[95]

§ 507. **Essential elements of a cause.**—(1) Before the plaintiff can recover in this case he must prove by a preponderance of the evidence, first, that he was charged with the crime of embezzlement; second, that he was arrested on said charge; third, that he was tried and acquitted on said charge; fourth, that the defendants, or such of them as are liable, if any, caused the arrest of the plaintiff, or were instrumental therein, or in some way voluntarily aided or abetted in the prosecution of the plaintiff; fifth, that such prosecution was malicious and without probable cause.[96]

(2) If you believe from the evidence that the defendant did no other acts in connection with the trespass charged in the complaint, except to bring an action before a justice of the peace for the possession of the tract of land on which the house described in the complaint is situated, as landlord against D as his tenant and prosecute the action to judgment, procure a writ of possession to be issued thereon and placed in hands of a special constable for service, and to be present in the public highway ready to receive the possession of the premises when the

[93] Jones v. Morris, 97 Va. 44, 33 S. E. 377.

[94] McCarthy v. Kitchen, 59 Ind. 505.

[95] McCarthy v. Kitchen, 59 Ind. 506. See, Flora v. Russell, 138 Ind. 153, 37 N. E. 593.

[96] Evansville & T. H. R. Co. v. Talbot, 131 Ind. 223, 29 N. E. 1134.

same should be delivered to him by said constable, he cannot be held liable in this action.[97]

§ 508. **Estimating damages.**—(1) In estimating damages, the jury are not to be confined to actual damages, but are at liberty to assess damages proportionate to the circumstances of outrage attending the illegal arrest. The limit of the sum, if you find for plaintiff, is as you shall find, but less than —— dollars.[98]

(2) In the event you should find for the plaintiff, in fixing the amount of damages you may take into consideration every circumstance of the acts of his arrest and prosecution, and also every act which injuriously affected the plaintiff, if any, not only in his person, but his peace of mind and individual happiness.[99]

Damage to Personal Property.

§ 509. **Unlawful seizure of property—Liability.**—(1) It is for the jury to determine from all the evidence in the case and the facts and circumstances proved, whether the piano in question was the property of the plaintiff or that of the defendants at the time the same is alleged to have been taken from the house of the plaintiff, and the jury should determine this from the evidence; and they are not bound to take the copy of the agreement in respect to the piano introduced in evidence as conclusive upon this point, but should consider the entire evidence in the case; and if the jury believe from the entire evidence that the defendants, B and B, sold said piano to the plaintiff at an agreed price of five hundred and ninety-five dollars, with a discount of forty dollars, to be paid for in monthly installments, and if the jury further believe from the evidence, and from all the circumstances proved in the case, that the plaintiff had fully paid the agreed price to the defendants at the time of the alleged taking of the piano by them; and if the jury further believe from the evidence that the dwelling house of the plaintiff was broken into against the will of the plaintiff and the said piano carried away by the direction

[97] Steele v. Davis, 75 Ind. 197. See this case for an instruction held proper as to the justice of the peace who was made a co-defendant.

[98] Hall v. O'Malley, 49 Tex. 71.

[99] Fisher v. Hamilton, 49 Ind. 349.

or connivance of the defendants, the jury should find for the plaintiff and against the defendants, or such of them as it is shown by the evidence, participated, aided and encouraged in the commission of the acts complained of.[100]

§ 510. **Landlord seizing tenant's property.**—(1) If you believe from the evidence that the plaintiff, O, was removing, was about to remove, or had within thirty days before the issuance of the said attachment removed any of his effects from the leased premises (whether with a fraudulent purpose or not, or whether any rent was then due or not), then such removal, or contemplated removal, was of itself sufficient cause for the said attachment, and the plaintiff is not entitled to recover anything in this action unless you believe that there was or would have been left on the premises property liable to distress sufficient to satisfy a year's rent.[101]

(2) If you believe from the evidence that there was a deed of trust on the property attached to P, trustee, made by the plaintiff after the property was carried on the leased premises, and such trustee intended to remove any of the said property from the leased premises, by sale or otherwise, not leaving sufficient property on the leased premises to satisfy a year's rent, and without securing to the landlord a year's rent, such intention on the part of said trustee was of itself sufficient cause for suing out the said attachment.[102]

(3) If you believe from the evidence that the attachment sued out by defendants against the plaintiff was sued out with sufficient cause, then the jury will find a verdict for the defendants; and the burden of showing the absence of sufficient cause rests upon the plaintiff.[103]

§ 511. **Damages for seizure—How estimated.**—(1) If you find that the plaintiff is entitled to recover, then, in arriving at the amount of your verdict, you must take into consideration the market value of the goods in question at the time of the seizure; and, in arriving at this market value, you have the right to consider the question as to whether the condition of the goods

[100] Bauer v. Bell, 74 Ill. 226.
[101] Offterdinger v. Ford, 92 Va. 644, 24 S. E. 246.
[102] Offterdinger v. Ford, 92 Va. 644, 24 S. E. 246.
[103] Offterdinger v. Ford, 92 Va. 644, 24 S. E. 246.

had changed between the day of the seizure and the day of the sale and you may also consider in this connection the amount that these goods brought at public auction under the execution sale as bearing upon this question, as bearing upon the market value at the time of the seizure and upon the amount of your verdict.[104]

(2) If you find from the evidence that the plaintiff was entitled to recover, she can only recover the actual value of the goods at the time of the seizure, and when arriving at this value you have the right to take into consideration all the evidence in the case as to the character and condition of the goods, whether new or second hand, or in good or bad condition, and also the evidence of the length of time the goods have been in stock, how they have been used, and how long in stock, and the fact that they have passed from hand to hand for a number of years.[105]

§ 512. **Killing stock—Liability.**—(1) If the defendant's horse was at the time trespassing in the plaintiff's field on plaintiff's land, or on the land of a third person where the plaintiff was pasturing his horse by the month for a consideration paid by the plaintiff to such owner, and there attacked and killed the plaintiff's horse, the defendant is liable for the injury, whether he knew or not of the vicious propensity of his horse.[106]

(2) If the jury find that the defendant's horse was in pasture on his wife's premises, and while there broke over her part of the partition fence, separating her lands from the field in which the plaintiff's horse was being rightfully pastured by him, the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture, and in such case, if the jury find that he killed the plaintiff's horse, the defendant is liable to the plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not.[107]

§ 513. **Damages from diseased cattle.**—(1) If you believe from the evidence that the defendant, A, brought or caused to be brought into R County, this state, Texas cattle, or cattle liable

[104] Showman v. Lee, 86 Mich. 564, 49 N. W. 578.

[105] Showman v. Lee, 86 Mich. 564, 49 N. W. 578.

[106] Morgan v. Hudnell, 52 Ohio St. 552, 40 N. E. 716.

[107] Morgan v. Hudnell, 52 Ohio St. 552, 40 N. E. 716.

to communicate Texas, Spanish or splenic fever to the domestic cattle of this state, and that said cattle came from the country south of this state between the first day of March, 1884, and the first day of November, 1884, and that the defendant knew or had reason to know or could by ordinary diligence have known that said cattle were diseased cattle, or were cattle liable to communicate Texas, Spanish or splenic fever to the domestic cattle of this state; or if the defendant knew or could with ordinary diligence have known that such cattle were diseased with said disease and were liable to communicate it to the domestic cattle of this state, and such cattle so brought or caused to be brought into said R county communicated such disease to the domestic cattle of the plaintiff, and thereby the plaintiff's cattle died, you will find for the plaintiff for the value of such cattle as she lost as shown by the evidence.[108]

(2) If you find from the evidence that the defendant, A, purchased the cattle described in the petition in good faith in —— in this state, without any knowledge that said cattle were infected with Texas, Spanish or splenic fever, and that he had no reason to believe that such cattle could or would communicate to cattle of this state, Texas, Spanish or splenic fever, and that he did not know or have reason to believe or know that such cattle would or could communicate the Texas, Spanish or splenic fever to the cattle of this state, until they arrived at R, and that the sheriff immediately seized such cattle by virtue of a process issued by W, a justice of the peace, and before the plaintiff's cattle had been exposed and were by the sheriff placed in quarantine, and the defendant, A, was deprived of any control over said cattle, and that during the time the said cattle were quarantined by the sheriff, and the defendant deprived of the control of said cattle, the plaintiff's cattle took such disease by going upon said quarantined ground, either while the defendant's cattle were there in the custody of the sheriff or his deputy or after they were removed therefrom, then the plaintiff cannot recover in the action.[109]

[108] Patee v. Adams, 37 Kas. 135, 14 Pac. 505.

[109] Patee v. Adams, 37 Kas. 135, 14 Pac. 505.

CHAPTER XXXVIII.

FRAUDULENT TRANSACTIONS.

Sec.
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§ 514, The law presumes men act fairly and honestly.—(1) Fraud is never to be presumed but must be proved by the party who alleges it. The law presumes that all men are fair and honest, that their dealings are in good faith and without intention to cheat, hinder, delay or defraud others; and if any transaction called in question is equally capable of two constructions, one that is fair and honest and the other dishonest, then, in that case, the law presumes the transaction to be fair and honest.[1]

(2) The law presumes that persons in their dealings intend to conduct them honestly; and where a transaction which is challenged will admit equally of an honest or a dishonest construction, it is the duty of the jury to accept the former, that is, to accept the honest construction.[2]

[1] Schroeder v. Walsh, 120 Ill. 410, 11 N. E. 70.

[2] Detroit Elec. & L. P. Co. v. Applebaum (Mich.), 94 N. W. 12.

(3) Fraud is odious in contemplation of law and not to be presumed, and the burden of proof is on the plaintiff to overcome such legal presumption by evidence satisfactory to the jury.[3]

(4) Fraud is odious in contemplation of law and not to be presumed, but must be proved by the party alleging it. The law presumes that all men are fair and honest in their dealings with others, and that they act in good faith and without intention to cheat, hinder, delay or defraud; and where a transaction which is challenged admits equally of an honest or dishonest construction, it is the duty of the jury to accept and adopt the former, that is, the construction in favor of honesty and fair dealing.[4]

(5) If the jury find there was a sale by O to plaintiff of the property in controversy, then you will inquire into and determine the character of this sale; that is, determine from the evidence whether or not it was fraudulent. It is alleged by defendants that it was and is fraudulent, and you are instructed that the burden of proving the same rests upon the defendants, and they must do so by a fair preponderance of the evidence; and you are instructed that the law presumes that all persons transact their business honestly and in good faith, until the contrary appears from the preponderance of the evidence; and, in this case, if you find there was a sale as claimed, it will be presumed that plaintiff and O acted honestly and in good faith in making the same, until such time as the defendants, who allege the contrary, establish the same by a fair preponderance of the evidence; and if the case is left in equipoise then the defendants must fail as to the fraud; and fraud will never be imputed when the facts upon which the charge is predicated are or may be consistent with honesty and purity of intention.[5]

§ 515. **Fraudulent representations resulting in damages.**—(1) A misrepresentation to be fraudulent must be as to a material matter or fact; it must be false and must be relied upon by the person to whom it is made, and it must constitute an inducement to enter into a transaction, must work injury or result directly in

[3] Robertson v. Parks, 76 Md. 125, 24 Atl. 411.

[4] Robertson v. Parks, 76 Md. 125, 24 Atl. 411; Schroeder v. Walsh, 120 Ill. 410, 11 N. E. 70; Detroit Elec. & L. P. Co. v. Applebaum (Mich.), 94 N. W. 12.

[5] Sunberg v. Babcock, 66 Iowa, 519, 24 N. W. 19.

damages to the person relying thereon, and the person to whom such misrepresentation is made must have a right to rely thereon. If all these circumstances concur, then there is fraud, and the party thus injured is entitled to relief.[6]

(2) If the defendant made false and fraudulent representations or statements as to any material matter of fact, and the plaintiff did not rely on them, but sought and obtained information as to such statements or facts from other sources, and then on his own judgment concluded to enter into the contract mentioned and to take his chances as to what he should get by reason thereof, then he cannot recover on that issue in this action.[7]

(3) If the defendant made false and fraudulent representations or statements, and the plaintiff did not rely on them, but sought and obtained information as to the facts from other sources, and then, on his own judgment, concluded to enter into the contract mentioned in the complaint, and take his chances as to what he should get by reason thereof, then he cannot recover in this action on that issue.[8]

(4) The plaintiff is entitled to recover the amount due on said notes, unless the jury find that the plaintiff made false representations in regard to the quality, improvements and natural advantages of said land; and if they find that he made such representations, then the jury can only deduct from the amount of said notes the value of the injury sustained by defendant on account of such false representations.[9]

§ 516. **Fraudulent representations in sale of stock.**—(1) If the jury find from the evidence that the plaintiff paid the sum of five thousand dollars to the company in question for certain shares of stock in said company, and shall find that the said plaintiff was induced to purchase said shares of stock in said company by the false representations and statements of the defendant, to the effect that the said shares of stock in said company were a safe and sure investment and would pay a high rate of interest, and shall further find that such representations and statements were false and fraudulent and known to be false and fraudulent by

[6] Jones v. Hathaway, 77 Ind. 24.

[7] Craig v. Hamilton, 118 Ind. 568, 21 N. E. 315; Jones v. Hathaway, 77 Ind. 24.

[8] Craig v. Hamilton, 118 Ind. 568, 21 N. E. 315.

[9] House v. Marshall, 18 Mo. 370.

said defendants, and that plaintiff relied upon these said false and fraudulent statements and representations and was thereby induced to purchase said shares of stock, the plaintiff is entitled to recover, if the jury further find that the said plaintiff suffered loss and damage by reason of said false and fraudulent representations and statements.[10]

(2) In order to entitle the plaintiff to recover in this case the jury must find from the evidence that the defendants, with a view to induce the plaintiff to subscribe to or purchase the stock in the company in question, made representations to him with respect to the value of their assets and extent of their business, which were false in fact when made, and that defendants had no reasonable ground to believe the same to be substantially correct when made, and also that the same were made with the fraudulent intent to cheat and deceive the plaintiff, and that the plaintiff had not at hand the means of verifying the truth of such representation, and that in subscribing to or purchasing said stock the plaintiff relied on such representations and would not have made such purchase except upon the faith of the same, and that in consequence thereof he was misled and injured.[11]

§ 517. Contract made to defeat creditors are void.—(1) If the jury believe from the evidence adduced that the conveyance from the plaintiff to the defendant was for the purpose of hindering, delaying or defeating the creditors of the plaintiff in any attempt they might make to enforce their claims against the plaintiff, and that was the understanding and agreement between the plaintiff and the defendant, and that the notes in suit were given in pursuance of this agreement between plaintiff and defendant, then the jury are instructed as a matter of law that the said agreement between the plaintiff and the defendant was illegal and cannot be enforced, and the jury must find for the defendant.[12]

(2) If the jury believe from the evidence that the conveyances to the defendant in evidence were made for the purpose of hindering, delaying or defrauding the creditors of the said plain-

[10] Robertson v. Parks, 76 Md. 120, 24 Atl. 411.

[11] Robertson v. Parks, 76 Md. 120, 24 Atl. 411.

[12] Riedle v. Mulhausen, 20 Ill. App. 72.

tiff or any of them, and that the notes sued on herein were executed and delievered by defendant to plaintiff in pursuance of such unlawful agreement and upon no other consideration, then you are instructed that such unlawful purpose precludes any recovery by the plaintiff against the defendant upon any notes so given upon such unlawful and fraudulent consideration, and your verdict should be for the defendant.[13]

(3) If the sale of said goods by P, and purchase by R, was not an honest and real sale and purchase but was a sham transaction or trade, made and gone into by them for the purpose of deceiving the creditors of P, or some of them, as to the real disposition to be made of the goods, they, P and R, knowing the trade would have the effect to defraud some of P's creditors, or hinder or delay some of them in the collection of their claims against him, then such sale and purchase was fraudulent and void as to such creditors, though said R may have given his note for the goods, and the note may have been applied or used in extinguishing some of the claims against P. Said R, under such circumstances, and if such were the real character of the transaction, cannot, in law, be considered a purchaser in good faith, and if you find said sale and purchase to be substantially of the character above stated, or for other reasons or facts presented by the evidence find said sale and purchase to have been made with intent to hinder or delay some of P's creditors in the collection of their claims, then you should find said sale and purchase fraudulent and void as to the creditors of said P.[14]

(4) Whether a conveyance of this character is fraudulent or not is a question of fact, to be determined on a view of all the circumstances attendant upon the making of the grant or conveyance, especially on the condition of the grantor as to property, and as to the amount of debts which were due and owing from him at the time he undertook to dispose of his estate, or a portion thereof, by gift, or without adequate consideration. On the one hand, it could not be properly adjudged that a voluntary conveyance was fraudulent and void, either as against existing or subsequent creditors, if it was proved to have been

[13] Riedle v. Mulhausen, 20 Ill. App. 72.

[14] Wadsworth v. Walker, 51 Iowa, 613, 2 N. W. 420; Nappanee Canning Co. v. Reid, &c. Co. 159 Ind. 614, 64 N. E. 870, 1115 (power of preferring creditors).

made by a person substantially free from debt and possessed of a large amount of property, who had no purpose to hinder or delay his creditors, whose sole motive was to transfer the property to his wife or children, so that it should not remain at the hazard of business or be subjected to the risk of improvidence. On the other hand, it would be very clear that a voluntary transfer of property by a person deeply indebted, and whose property was inadequate or barely sufficient for the payment of his debts, would furnish strong presumptive evidence of fraud, and if unexplained would be set aside as void against creditors.[15]

§ 518. Innocent purchaser for fair consideration, protected. (1) Although you should find that C made one or both sales to plaintiff, with intent to hinder, delay and defraud his creditors, yet if he paid a valuable consideration for the goods, such intent on the part of C would not alone make the sale void. In order to invalidate the sale, it must further appear from the evidence that the plaintiff, at the time he bought and paid for the goods, had notice of such intent on the part of C, or that he had knowledge of facts or circumstances such as would have put an ordinarily prudent man upon inquiry, which, by the use of proper diligence on his part, would have led to a knowledge of such intention on the part of C.[16]

(2) If you believe from the evidence in this case that the defendants purchased the property in controversy in this action from B for a full, fair and valuable consideration and without notice that the said B was seeking and intending thereby to cheat, hinder, delay and defraud his creditors out of their just demands existing at the time of said purchase, and that if you further find that they, the defendants, had paid the consideration and received their deeds for said property before the fraudulent intent of the said B to cheat, hinder and defraud his creditors had come to their knowledge, then and in that case the said defendants would be bona fide purchasers of the property so conveyed to them, and would be entitled to hold the same free from the claims of the creditors of the said B. And any person buying from them, the defendants,

[15] Winchester v. Charter, 102 Mass. 273.

[16] Dodd v. Gaines, 82 Tex. 433, 18 S. W. 618.

under such circumstances, would be entitled to hold the property as against all persons, and this, whether the second purchaser had knowledge of the fraudulent intent of said B to cheat and defraud his creditors in the original conveyance or not.[17]

§ 519. **Purchaser knowing fraudulent intent of seller.**—If the sale was made by C to the plaintiff, G, with intent to hinder, delay or defraud his creditors, and that G, at the time of the purchase, knew of such intent on the part of C to hinder, delay or defraud his creditors, or if he knew such facts or circumstances as would have put a man of ordinary prudence upon inquiry, and which, by the use of ordinary diligence on his part, would have led to a knowledge on his part that such was the intention of C in selling the goods to him, then such sale as between plaintiff and defendant is fraudulent and void.[18]

§ 520. **Opinion as to value not basis of fraud.**—The plaintiff is not entitled to recover on account of any representations they may find the defendants, or either of them, may have made to the plaintiff, that the stock of the company in question would pay as much as twenty per cent dividend or for any other expression of opinion concerning the future value and profitableness of the business they are carrying on. The jury must exclude such representations as constituting a basis of recovery in this action.[19]

§ 521. **Sureties induced to sign bond by fraud.**—If you find that T. at and before the time the bond was required of him was intentionally and dishonestly a defaulter to the express company, as to moneys intrusted to it, which he had received as its agent, and that the witness, D, acted for said company in demanding and receiving said bond, and, before receiving the same, either knew of such default, or if he did not know it, believed upon reasonable and reliable ground of information or belief that such default existed, then, if suitable and reasonable opportunity existed, it was the duty of the witness,

[17] Nicklaus v. Burns, 75 Ind. 96.
[18] Dodd v. Gaines, 82 Tex. 433, 18 S. W. 618.
[19] Robertson v. Parks, 76 Md. 123, 24 Atl. 411.

D, as the agent of the company, to make known to the sureties upon the bond such fact of T's delinquency, or witness' belief of such delinquency, before accepting the bond, although the witness did not know before the bond was signed by the sureties who they were to be, and, as witness did not give such information, if the sureties, in signing the bond, acted under a belief from its recitals that the company considered T a trustworthy person, and would not have signed the bond but for such belief, then the plaintiff cannot recover against the sureties, or either of them.[20]

§ 522. **Fraud practiced in sale of land, resulting in damages.** (1) If the jury believe from the evidence that the plaintiff at or before the sale of the land in question to the defendant, knowing said land to be subject to overflow, used any artifice to mislead the mind of the defendant and throw him off his guard, and to prevent him from making as careful examination of the land in question as a man of ordinary prudence would otherwise have made; and that the defendant was thereby misled and thrown off his guard and prevented from examining said land, and in consequence thereof, was and remained ignorant of the fact that said land was subject to overflow up to the time when he bought said land, then and in that case the jury should find for the defendant and assess his damages according to the measure heretofore stated by the court.[21]

(2) If you believe from the evidence that at the time the plaintiff purchased the lot in question the defendant knew that it was intended as a residence lot; and if you further believe that he then and there told the defendant where and on what part of said lot he wished to build his house, and what the style of the house should be, and in what direction it should front: and if you believe the defendant then and there as an inducement to the plaintiff to purchase said lot for a residence, represented to him that there was a street on the east and on the north side of him; and if you believe that by said representations the plaintiff was induced to purchase said lot for the sum of four hundred dollars for the purpose aforesaid, and

[20] Dinsmore v. Tidball, 34 Ohio St. 411.

[21] McFarland v. Carver, 34 Mo. 196.

that such purpose was known to the defendant; if you believe that the plaintiff then and there made said purchase and proceeded to build and did build a residence in the northeast corner of said lot, fronting east and north, and that such design was communicated to the defendant at and before the time of said sale; and if you further believe that said representations of the defendant made about a street on the north were false, and known to the defendant at the time they were made to be false; and if you believe that the plaintiff has been damaged thereby, then you will allow him for the same.[22]

§ 523. **Contracts between husband and wife scrutinized.**—(1) A husband may contract with his wife in relation to her separate estate, but on account of the peculiar relations of the husband and wife toward each other, and the trust and confidence that the wife is presumed to have in her husband, and the influence he is supposed naturally to exercise over her, the law looks with much caution upon such contracts, and requires of the husband the most scrupulous good faith, and if there be any element of fraud or lack of consideration, the law scrutinizes it with much care, and will only uphold it when it is for the benefit of the wife or has been made with the utmost good faith.[23]

(2) Gross inadequacy of consideration, if it exists, is a badge of fraud and a circumstance which may be considered by the jury in determining whether the conveyance by A to his wife, Mrs. A (claimant) was fair an honest or pretended and fraudulent. Transactions between husband and wife should be scanned carefully when the rights of creditors are to be affected thereby. The law requires them to exercise good faith, and you should be satisfied that they have done so before sustaining any transaction which would defeat a creditor in the collection of his debt. You should be satisfied of the actual existence of a just debt due from A to Mrs. A, and that it was the consideration of the deeds to her, and that the consideration was not inadequate before you would be authorized to sustain the title against creditors. All dealings between hus-

[22] White v. Smith, 54 Iowa, 237, 6 N. W. 284.

[23] Hon v. Hon, 70 Ind. 135.

band and wife which are injurious to creditors should be scrutinized closely, and their bona fides must be clearly established, and in such case the burden of proof is on them as to this.[24]

(3) A husband may contract with his wife in relation to her separate estate, but on account of their peculiar relation toward each other and the trust and confidence the wife is presumed to have in the husband, and the influence he is supposed naturally to exercise over her, the law looks with much caution upon such contracts, and requires of the husband the most scrupulous good faith; and if there be any element of fraud or lack of consideration, the law scrutinizes it with much care, and will only uphold it when it is for the benefit of the wife, or has been made with the utmost good faith. Transactions between husband and wife should be scanned carefully when the rights of creditors are to be affected thereby. All dealings between husband and wife which are injurious to creditors should be scrutinized closely, and their good faith must be clearly established, and in such case the burden of proof is on them in this respect.[25]

§ 524. Fraudulent assignment to compel compromise.—(1) If the real object or intent of M, the assignor, in making this assignment was not the one expressed on its face, but to induce, persuade or force creditors to agree and consent to a compromise, which he was then attempting to make with his creditors, and to compel such creditors to accept fifty cents on the dollar, then and in such case the assignment was fraudulent, and void as to creditors.[26]

(2) The court instructs the jury that as to the assignment under which the plaintiff claims in this case there is but a single question for you to pass upon, viz.: What was the intent of M, and what was his purpose in making it? The intent with which the plaintiff, B, received the assignment is immaterial.[27]

(3) The plaintiff, B, under this assignment, does not stand in the position of a purchaser for valuable consideration; and the fact (if such be the case) that he had no knowledge that it was

[24] Almond v. Gairdner, 76 Ga. 701.

[25] Hon v. Hon, 70 Ind. 135; Almond v. Gairdner, 76 Ga. 701.

[26] Bennett v. Ellison, 23 Minn. 246.

[27] Bennett v. Ellison, 23 Minn. 245.

M's intention, in making the assignment, to effect a compromise with his creditors cannot cure the effect of such intention on M's part. If such intention existed on M's part, at the time he executed the assignment, it is void, no matter whether plaintiff, B, knew M's intention or not, and your verdict should be for the defendant [28]

§ 525. **Fraud in reference to indebtedness.**—If you believe that the representation charged and relied upon as false and fraudulent, was that the plaintiff was indebted to the defendant in a certain sum, and the plaintiff was in fact so indebted, then your finding must be for the defendant upon the question of fraud. This will be so, even though the defendant may have by mistake wrongfully stated the items, or some of the items, which formed the consideration of such alleged indebtedness.[29]

§ 526. **Contract made under compulsion may be avoided.**—(1) A contract made under compulsion may be avoided by the party compelled to execute it. Compulsion, however, to have this effect must amount to what the law calls duress. Mere angry or profane words, or strong, earnest language cannot constitute such compulsion as will amount to duress, or enable a person to be relieved from his contract. There may be duress by threats. But duress by threats exists only where a person has entered into a contract under the influence of such threat as excites or may reasonably excite a fear of some grievous wrong, as bodily injury or unlawful imprisonment.[30]

(2) If the payee of the note surrendered it to the maker voluntarily, in liquidation of a just debt then due from him to them, the note was fully canceled by the surrender; but if the note was obtained wrongfully and unlawfully by threats and duress, it was not canceled by the surrender, and the plaintiff can maintain an action for the amount due thereon, if she is the owner thereof.[31]

§ 527. **What constitutes duress to avoid a contract.**—(1) To constitute duress, which would avoid the deed, it is not necessary

[28] Bennett v. Ellison, 23 Minn. 246.

[29] Adams v. Stringer, 78 Ind. 181.

[30] Adams v. Stringer, 78 Ind. 180.

[31] Kohler v. Wilson, 40 Iowa, 185.

that the threats be of a physical injury alone; but if the plaintiff, the wife of Tapley, was induced to execute the deed by the threats of her husband, that he would separate from her as her husband and not support her, it is duress, and will avoid the deed. The threats must be such as she might reasonably apprehend would be carried into execution, and the act of executing the deed must have been induced by the threats. It is not necessary that the threats be made at the time, or immediately before signing, if it was within such time, and the circumstances satisfy you that the threats or their influence properly conduced to influence the plaintiff.[32]

(2) The rule in this class of cases is, that where a payment of money is made upon an illegal or unjust demand, when the party is advised of all the facts, it can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where the person making the payment can only be reached by a proceeding at law, he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence and afterwards suing to recover it back.[33]

§ 528. **Gambling contracts—On markets.**—(1) If the jury shall find from the testimony that on or about the time stated in the petition in this cause the defendant received from the plaintiff the sum of money in question under an arrangement that the same should be invested by the defendant in wheat transactions, illegal in their character, for the benefit of the plaintiff; that said sum of money was so invested by the defendant and a profit realized thereon; and that before the commencement of this suit said sum of money and the profits so made came into and are still in the hands of the defendant; or that he received credit therefor in the final settlement of his accounts with the brokers, through whom said business was transacted, then the plaintiff is entitled to recover said sum of money from the defendant; nor in such case can the defendant avoid his liability

[32] Tapley v. Tapley, 10 Minn. 458.

[33] Lieber v. Weiden, 17 Neb. 584, 24 N. W. 215.

to account for said moneys, by showing that, by the understanding between the plaintiff and himself, said sum of money was to be employed in illegal transactions in wheat of the nature stated in his answer, and that said sum of money was employed and said profits realized in such transactions.[34]

(2) If the jury shall find from the evidence that when the defendant gave to the plaintiffs the several orders offered in evidence for the purchase and sale of grain, it was mutually understood between them that the defendant was not to deliver any of the grain that he ordered to be sold, or to accept any of the grain that he ordered to be bought, but that all of said transactions in grain were to be settled and adjusted by the payment or receipt, as the case might be, of differences between the price at which said grain should be bought and at which it should be sold; and if the jury shall further find that in pursuance of said mutual understanding, the plaintiffs, in their own names, transmitted to their correspondents for execution said orders of the defendant, and that said orders were executed by the said correspondents of the plaintiffs upon the credit of the plaintiffs and upon security furnished by them, then the plaintiffs are not entitled to recover in this action for services rendered or advances made by them in furthering and conducting said transactions for the defendant.[35]

[34] Norton v. Blinn, 39 Ohio St. 145.

[35] Stewart v. Schall, 65 Md. 294, 4 Atl. 399. See, Shaffner v. Pinchback, 133 Ill. 410, betting on horserace, contract void. Forms.

CHAPTER XXXIX.

NEGLIGENCE GENERALLY.

Sec.
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§ 529. **Negligence, carelessness, care, defined.**—(1) Negligence and carelessness, applied to both plaintiff and defendant, means the failure to exercise ordinary care—that is, such care as ought to be expected of a reasonably prudent person under similar cimcumstances.[1]

(2) Negligence has been aptly defined to be the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do, under the circumstances of a given case.[2]

(3) Negligence consists in a want of the reasonable care which

[1] Henry v. Grand Ave. R. Co. 113 Mo. 534, 21 S. W. 214.

[2] Traver v. Spokane St. R. Co. 25 Wash. 239, 65 Pac. 284.

would be exercised by a person of ordinary prudence, under all existing circumstances, in view of the probable danger of injury.[3]

(4) Negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.[4]

(5) Negligence is the failure to exercise ordinary care—that is, such care as ought to be expected of a reasonably prudent person under similar circumstances. In other words, negligence is the failure to do what a reasonably prudent person would ordinarily have done under the circumstances of the situation, or doing what such person under the existing circumstances would not have done.[5]

(6) Gross negligence is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under like circumstances of equal or similar danger to the plaintiff on the occasion under consideration.[6]

(7) As to the question of negligence upon the part of that person or those persons in control of the extra passenger train mentioned in the evidence, negligence may be defined as a failure to discharge the duty of taking ordinary care to avoid the injury of one to whom the duty is due, such failure being the direct and proximate cause of the injury; that ordinary care is such as a prudent man of the requisite skill will take under the circumstances of the particular case, and that the plaintiff must show by a preponderance of evidence such failure upon the part of the person or persons in charge of the extra passenger train, before the defendant can be held liable for the acts or omissions of such person or persons.[7]

§ 530. **Ordinary care defined.**—(1) In relation to the care required of each party you will only hold them to the exercise of ordinary care, which consists in doing everything which a person

[3] Little R. & Ft. S. R. Co. v. Atkins, 46 Ark. 430.

[4] St. Louis S. W. R. Co. v. Smith (Tex. Cv. App.), 77 S. W. 28.

[5] Henry v. Grand Ave. R. Co. 113 Mo. 534, 21 S. W. 214; St. Louis S. W. R. Co. v. Smith (Tex. Cv. App.), 77 S. W. 28.

[6] Chesapeake & O. R. Co. v. Board (Ky. App.), 77 S. W. 189.

[7] Davidson v. Pittsburg, C. C. & St. L. R. Co. 41 W. Va. 417, 23 S. E. 593.

of ordinary care and prudence would do, and omitting to do everything which a person of like care and diligence would omit to do.[8]

(2) The defendant is only required to use ordinary care in the operation of its cars, and the plaintiff is required to use the same degree of care—that is, ordinary care—in the use of the streets, and in crossing or going upon the track of the defendant. By ordinary care is meant such care as an ordinarily prudent person would use under the particular circumstances involved.[9]

(3) Ordinary care is that degree of care which an ordinarily prudent person would exercise under like situation and circumstances.[10]

(4) Ordinary care is that degree of care which an ordinarily prudent person would exercise under like situation and circumstances. Or ordinary care consists in the doing of something which a person of ordinary care and prudence would do, and omitting to do something which a person of like care and diligence would omit to do.[11]

(5) Ordinary care, as mentioned in these instructions, is the degree of care which an ordinarily prudent person, situated as the deceased was, as shown by the evidence before and at the time of the injury, would usually exercise for his own safety.[12]

(6) By the term ordinary care, as used in these instructions, is meant that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances. A failure to exercise ordinary care is negligence.[13]

(7) The ordinary care and prudence which the plaintiff was required to use were such acts and conduct on her part as would be the natural and ordinary course of prudent and discreet persons under similar circumstances—that is to say, such degree of care as should have been reasonably expected from an ordinarily prudent person in her situation.[14]

[8] Hart v. Cedar R. & M. C. R. Co. 109 Iowa, 637, 80 N. W. 662.

[9] Traver v. Spokane St. R. Co. 25 Wash. 242, 65 Pac. 284.

[10] North C. St. R. Co. v. Irwin, 202 Ill. 348, 66 N. E. 1077.

[11] North C. St. R. Co. v. Irwin, 202 Ill. 348, 66 N. E. 1077; Hart v. Cedar R. & M. C. R. Co. 109 Iowa, 637, 80 N. W. 662.

[12] Chicago C. R. Co. v. O'Donnell, 208 Ill. 273. Held not assuming that the deceased was in the exercise of due care.

[13] Peterson v. Wistman (Mo. App.), 77 S. W. 1016.

[14] Baltimore & O. R. Co. v. Owings, 65 Md. 504, 5 Atl. 329.

(8) By ordinary care is meant that degree of care which may be reasonably expected of a person in the situation of the plaintiff at the time the injury was received.[15]

(9) The term "ordinary care," as used in these instructions, means such care as would ordinarily be used by prudent persons in the performance of like service under the same circumstances.[16]

§ 531. **Burden of proof generally.**—(1) The burden of proof is on the plaintiff to establish by a preponderance of the evidence the facts necessary to entitle him to a verdict, under these instructions, except upon the issue concerning the exercise of ordinary care by the plaintiff. As to that issue, the burden of proof is on the defendant to show the want of such ordinary care on the plaintiff's part.[17]

(2) In order to defeat a recovery in this suit on the ground of contributory negligence upon the part of the plaintiff, the burden of proof is upon the defendant to show that the plaintiff was guilty of negligence, and that such negligence on her part directly contributed to produce the injury.[18]

(3) In order to defeat a recovery on the ground of contributory negligence on plaintiff's part, the defendant must satisfy the jury by preponderating evidence of two facts: first, that the plaintiff was negligent; and, second, that such negligence directly contributed to the injury.[19]

(4) Before the plaintiff can recover in this action, it must appear that the defendant was guilty of some act of negligence which directly contributed to the accident. It must also appear that the plaintiff was without the least fault or negligence on her part which may in any wise have contributed to the accident; and it is the same whether what she did was of her own volition or by the advice or guidance of her husband.[20]

(5) The burden of proof is upon the plaintiffs to show negligence on the part of the defendant. If they fail to show any facts

[15] Houston & T. C. R. Co. v. Corbett, 49 Tex. 575.

[16] Mirrielees v. Wabash R. Co. 163 Mo. 470, 63 S. W. 718.

[17] O'Connell v. St. Louis, C. & W. R. Co. 106 Mo. 485, 17 S. W. 494.

[18] Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 150, 7 Atl. 105.

[19] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 520, 20 Atl. 2. Such an instruction should be qualified by others, stating that evidence showing plaintiff's contributory negligence will defeat his action whether introduced by defendant or plaintiff.

[20] Curtis v. Detroit & M. R. Co. 27 Wis. 160.

which in law would be deemed negligence, then the plaintiffs cannot recover, and the fact or circumstance relied on must have contributed to the injury complained of; and in this connection the jury will also understand that they must be convinced from the evidence that the plaintiffs were guilty of no fault or negligence on their part.[21]

(6) The law devolves upon the plaintiff the duty and burden of making out her case as alleged, and showing her right to a recovery by a fair preponderance of the evidence. When she has done this, then the burden is upon the defendant company to show that the deceased at the time did not act as a person of ordinary prudence and caution would have acted, or was in a place or position where an ordinarily prudent and cautious person would not have been, before plaintiff could be denied a recovery.[22]

(7) The plaintiff has alleged in each paragraph, among other things, that he received the injury complained of without fault or negligence on his part. This is a material and necessary allegation. Without such allegation his complaint would not have been sufficient to have constituted a cause of action, and before the plaintiff can recover he must have proved by a fair preponderance of the evidence that he did receive said injuries, without fault or negligence on his part, directly and materially contributing to the injury. It is not enough to enable the plaintiff to recover that he shall have proved fault and negligence on the part of the defendant; he must also prove that he himself was free from such fault or negligence, and, if he has failed to prove by a fair preponderance of the evidence that he received the injury without such fault or negligence on his own part he cannot recover.[23]

§ 532. Degree of care required of defendant.—(1) What the law demands of the defendant is only that which men of skill and vigilance are capable of exercising before the happening of an accident, and not the adoption of extraordinary and pro-

[21] Curtis v. Detroit & M. R. Co. 27 Wis. 161; Baran v. Reading Iron Co. 202 Pa. 280, 51 Atl. 979.

[22] Southerland v. Tex. & P. R. Co. (Tex. Cv. App.), 40 S. W. 195.

[23] Todd v. Danner, 17 Ind. App. 368, 46 N. E. 829. By a recent statute of Indiana the plaintiff has been relieved from the burden of proving his own freedom from contributory negligence, Indianapolis St. R. Co. v. Robinson, 157 Ind. 232.

phetic measures of precaution, which the peculiar circumstances of the event may afterwards show might have prevented it.[24]

(2) A corporation or person furnishing natural gas to the stoves, heaters, burners, pipes, pipe lines, machinery or apparatus of another, to be used for the purpose of domestic heating, for fuel in a dwelling house, storeroom, office or shop, is bound to exercise such care, skill and diligence in all its operations as is called for by the delicacy, difficulty and dangerousness of the nature of its business, in order that injury may not be done to others—that is to say, if the danger, delicacy or difficulty is extraordinarily great, extraordinary skill and diligence is required.[25]

(3) It is for the jury to determine upon all the facts and circumstances in evidence whether the explosion of the boiler was or was not caused by the want of a reasonable degree of skill of one in the employ of said company, or whether said explosion was or was not caused by the failure of said employe in charge of said boiler to use a reasonable degree of care and caution to prevent said explosion.[26]

(4) The defendants were bound to adopt such precautions to keep the track clear and prevent persons from driving on the track during the race, as men of ordinary care and prudence would adopt under similar circumstances; and it was not enough to order men off the track, but they should have had a force sufficent to keep them off, they being bound to use due and proper skill and care to prevent any person engaged in the race from being injured by the ignorant, negligent or reckless acts of the spectators, or persons not engaged in the race; that the degree of care the defendants were bound to use in such a case as this must be measured by the extent of peril to human life and limb which would be occasioned by neglect, and must therefore be the highest which may reasonably be exercised in order to prevent those injuries which human foresight could avert; the defendants were not bound at all events to keep the track clear; and the plaintiff can not make out his case by only showing that there was an obstruction on the track, but he must show that the defendants had in some way failed in

[24] Curtis v. Detroit & M. R. Co. 27 Wis. 161.

[25] Citizens Gas & O. M. Co. v. Whipple (Ind.), 69 N. E. 559.

[26] Smith v. Warden, 86 Mo. 395.

their duty, which was to use every effort which reasonable men could be expected to use to keep the track clear.[27]

§ 533. **Care in driving vehicle.**—Even if the jury should believe from the evidence that the defendant was not, at the time of the injury complained of, driving at an unusual rate of speed, still, if they further believe from the evidence that the defendant did commit the injury upon the plaintiff, as charged in the declaration, while she was using due and proper care, and the defendants might, by using ordinary and proper care at the time, have avoided committing such injury, and that as the consequence of a want of such reasonable and ordinary care on the part of the defendants, the plaintiff received the injuries complained of, then the jury should find the defendants guilty and assess the plaintiff's damages at such sum as they may think, from the testimony, will compensate her for the injuries so sustained by her, not to exceed the amount claimed in the declaration.[28]

§ 534. **Care and safety of machinery.**—(1) It was not the duty of the plaintiff to furnish a guard or any part of the same to be used on the machine on which he was injured, nor was it his duty to ask the defendant to properly guard said machine for the various kinds of work he was required to do, nor to complain to it because the machine was not so guarded.[29]

(2) If the plaintiff was in the employ of the lessees of the elevator at the time of the injury, and had been ever since the building in question was erected, and the firm had had the entire and exclusive use and occupancy of the building in question and of the elevator during all that time, the defendant having no right to use or occupy any of it in any way, the plaintiff cannot recover.[30]

(3) The defendant was not bound to furnish the very best or most improved kind of machinery to be used in its manufactory; and if the jury believe, from the evidence, that the engine, governor, emery-wheel and the frame and flanges connected with the

[27] Goodale v. Worcester Agr. S. 102 Mass. 405.

[28] Schmidt v. Sinnott, 103 Ill. 160, 164. Held not submitting to the jury a question of law to be determined by them.

[29] Blanchard-Hamilton Furniture Co. v. Calvin (Ind.), 69 N. E. 1035.

[30] Sinton v. Butler, 40 Ohio St. 158.

same were reasonably safe, and such as are ordinarily used in similar establishments, they must find for the defendant.[31]

(4) The fact that there were boilers and engines in an adjoining store which created the power to run the elevator in question, and heat for the store and other stores just like it, and the defendant hired the engineer and paid for the running of it and the fuel, upon the agreement contained in the lease that the lessees should pay for all such services, did not give the use of any portion of the building or elevator in question to the defendant, or deprive the lessees of the exclusive occupancy of it.[32]

(5) It was the duty of the plaintiff when he accepted employment from the defendant to exercise ordinary care for his own safety, and not knowingly to expose himself to unnecessary risks or dangers connected with his said employment. And the court instructs the jury that the plaintiff, when he accepted employment from the defendant to operate the machine known as a "joiner," assumed all the risks incident to such employment—that is, such risks as naturally arose out of or were necessarily connected with said employment. But he did not assume risks that were unknown to him, and which were not incident to his employment, nor such risks which the defendant could by the exercise of ordinary care have guarded against.[33]

(6) It was the duty of the defendant when he employed the plaintiff to exercise ordinary care in providing him with a reasonably safe machine or joiner; that is, one in good order and fitted for the purpose and work for which it was intended. It was the duty of the defendant to exercise ordinary care in keeping the same in reasonably safe condition for the use of the plaintiff while he was so engaged in operating the said machine.[34]

(7) If you believe from the evidence that the injury to the plaintiff, complained of in his petition, was not the result of any defect in the machine joiner, but was the result of such a risk or danger as naturally arose or grew out of the plaintiff's employment, and was naturally attendant upon said employment, then the law is for the defendant and the jury should so find.[35]

[31] Camp P. Mfg. Co. v. Ballou, 71 Ill. 421.

[32] Sinton v. Butler, 40 Ohio St. 158.

[33] Reiser v. Southern P. M. & L. Co. 24 Ky. 796, 69 S. W. 1086.

[34] Reiser v. Southern P. M. & L. Co. 24 Ky. 796, 69 S. W. 1086 (the plaintiff was an infant).

[35] Reiser v. Southern P. M. & L. Co. 24 Ky. 796, 69 S. W. 1086.

(8) If you find that a minor employé did not understand all the dangers and hazards of the situation in which he was placed by the foreman, and that it was a dangerous and hazardous situation in which to place a boy of his age, judgment and experience, then it was the duty of the foreman to instruct him in respect thereto, that he might conduct himself so as to guard against such peril.[36]

§ 535. **Care of injured party may be inferred.**—In considering the question of negligence it is competent and proper for the jury in connection with the other facts and circumstances of the case to infer the absence of fault on the part of the deceased, from the general and known disposition of men to take care of themselves and to keep out of the way of difficulty and danger.[37]

§ 536. **Infant—Degree of care required.**—(1) The rule that refuses damages to an individual whose negligence, however slight, has in any manner contributed to produce the injury for which he sues, presupposes that he has reached an age when he has sufficient intelligence to know the existence of danger, and sufficient thought to protect himself from its consequences. This rule, therefore, does not and cannot apply to an infant of two years or less; and if an infant of that age is found alone in a place where he is exposed to danger, and in a situation where he can easily be seen, it is the duty of every person approaching him to use all the care and caution that such person may command to avoid injury to him; and if such person fail to use such care and caution, and injury results to the infant from the want of such care and caution, such person is guilty of negligence and would be liable to the infant for the injuries so caused, had such infant survived such injury.[38]

(2) The conduct of an infant is not of necessity to be judged by the same rules which govern that of an adult; while it is the general rule in regard to an adult or grown person that to entitle him or her to recover damages for an injury resulting from the fault or negligence of another, he or she must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to

[36] Rolling Mill Co. v. Corrigan, 46 Ohio St. 290, 20 N. E. 466; Thomp. on Neg. 978.

[37] Baltimore & O. R. Co. v. S. &c. 60 Md. 452.

[38] Walters v. Chicago, R. I. & P. R. Co. 41 Iowa, 75; see, Illinois, &c. R. Co. v. Slater, 129 Ill. 91, 99.

its maturity and capacity wholly, and this is to be determined by the circumstances of the case and the evidence before the jury, and the law presumes that a child, between the ages of seven and fourteen years, cannot be guilty of contributory negligence, and in order to establish that a child of such age is capable of contributory negligence such presumption must be rebutted by evidence and circumstances establishing his maturity and capacity.[39]

(3) The conduct of an infant is not of necessity to be judged by the same rule which governs that of an adult. While it is a general rule in regard to an adult or grown person, that to entitle him to recover damages for any injury resulting from the fault or negligence of another he must have been free from fault, such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity wholly; and this is to be determined by the circumstances of the case and the evidence before the jury.[40]

(4) If the jury shall find from the evidence that the death of the child resulted from the want of ordinary care and caution on the part of a driver in the employment of the defendant, the plaintiff is entitled to recover; provided the jury find that the accident causing her death could not have been avoided by the exercise of such care and caution by the child as ought, under all the circumstances, to have been reasonably expected from one of her age and intelligence, or by the exercise of ordinary care and caution on the part of the father of the child, or of the person accompanying the child at the time of the accident.[41]

(5) It is the duty of an infant employé to use ordinary care and prudence, just such care and prudence as a boy of his age of ordinary care and prudence would use under like or similar circumstances. You should take into consideration his age, the judgment and knowledge he possessed. If not understanding all the dangers and hazards of the situation in which he was placed by the foreman, and you find it was a dangerous and hazardous situation in which to place a boy of his age, judgment and experience, it was the duty of the foreman to instruct him

[39] Richmond Tr. Co. v. Wilkinson (Va.), 43 S E. 623.

[40] Washington, A. & Mt. V. Elec. R. Co. v. Quayle, 95 Va. 747, 30 S. E. 391.

[41] Baltimore & O. R. Co. v. S. 30 Md. 48.

in reference thereto, that he might conduct himself so as to guard against such peril; and if he was injured by reason of the neglect or carelessness of the defendant, and by reason of his youth and want of judgment as to the perils of his position, did some act in the discharge of his duty as he understood it, which also contributed to the injury, and which he did not know to be likely to injure him and had not been properly advised and instructed therein by the foreman, he is entitled to recover.[42]

(6) If the jury believe from the evidence in this case that the plaintiff permitted his decedent, D, a boy about nine years of age, to go from his home at W after or to get his elderberries, but did not know that he was going to ride on a handcar, he, the plaintiff, is not by reason of such permission guilty of contributory negligence, and the defendant cannot be relieved from liability solely because the plaintiff thus permitted his said son to go from home.[43]

(7) It does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury. The negligence of the parent in such a case would be too remote.[44]

§ 537. Children—Care of defendant toward them.—(1) The defendant was under no obligation to the plaintiff to keep its lumber yard in safe or proper condition for plaintiff to play thereon. The yards were its property and it was entitled, as to plaintiff, to use them for piling lumber and to pile the same in such form as it found convenient, with due regard for the safety of such persons only as might properly use the yards. It was under no obligations to so pile or place its bridge ties as to prevent injury to a child climbing upon them, or to so pile, fasten or brace the same that the child could not, in trying to climb thereon, pull one or more of them down upon herself, nor can it be held negligent for failing to so pile, brace or secure them, if the injured

[42] Rolling Mill v. Corrigan, 46 Ohio St. 283, 20 N. E. 466.

[43] Davidson v. Pittsburg, C. C. & St. L. R. Co. 41 W. Va. 411, 23 S. E. 593.

[44] Wiswell v. Doyle, 160 Mass. 44, 35 N. E. 107.

person was at the time thereon without its knowledge or invitation.[45]

(2) The defendant was under no obligation to keep watch over its premises, in order to exclude children therefrom. If the watchman of defendant discovered plaintiff with others playing in the yard shortly before the accident and requested them to leave, and plaintiff thereupon withdrew from the premises, but thereafter returned without the knowledge of defendant's watchman or person in charge of its property, for the purpose of playing in the yard, and while so doing was injured, without such watchman having knowledge of her being then present; and while playing there pulled down upon herself or caused to fall a tie, or portion of a pile of ties, upon which she was climbing, defendant would not be liable to plaintiff for any injury so received.[46]

§ 538. **Negligence may be inferred—When.**—(1) When the fact has been established that a passenger in a railroad car has been injured without his fault by the car in which he was riding being thrown from the track and upset, the law will presume negligence on the part of the railroad company, unless the evidence shows there was no negligence.[47]

§ 539. **Negligence will not be presumed.**—(1) The burden of proof is on the plaintiff to show that he was injured by the defendant's negligence, either in not providing safe and suitable cars, or in not properly inspecting and taking care of them. A mere statement that a person was injured while riding on a railway, without any statement of the character, manner or circumstances of the injury, does not raise a presumption of negligence on the part of the railway company. But, if the character, manner or circumstances of the injury are also stated, such statement may raise, on the one hand, a presumption of such negligence, or, on

[45] Missouri, K. & T. R. Co. v. Edwards, 90, Tex. 69, 36 S. W. 430. But see Penso v. McCormick, 125 Ind. 116, 25 N. E. 156.

[46] Missouri, K. & T. R. Co. v. Edwards, 90 Tex. 69, 36 S. W. 430. But see Penso v. McCormick, 125 Ind. 116, 25 N. E. 156.

[47] Pittsburg, C. & St. L. R. Co. v. Williams, 74 Ind. 464, citing Edgerton v. New York R. Co. 39 N. Y. 227; Pittsburg, &c. R. Co. v. Thompson, 56 Ill. 138; Sullivan v. Philadelphia, &c. R. Co. 30 Pa. St. 234; Baltimore, &c. R. Co. v. Worthington, 21 Md. 275; Yonge v. Kinney, 28 Ga. 1; New Orleans R. Co. v. Allbritton, 38 Miss. 242; Higgins v. Hannibal, &c. R. Co. 36 Mo. 418; Stokes v. Saltonstall, 13 Pet. (U. S.), 181.

the other, a presumption that there was no such negligence. If the plaintiff was in fact injured while sitting in her proper place, by the falling of the upper berth upon her head, while said berth ought to have remained in place above, such fact raises a presumption in this case of negligence for which the defendant is liable. If you find that there was no defect in the road, or in the car or in the mechanism used, yet if, upon the evidence in the case, you find it reasonable to presume that the accident happened by reason of the upper berth not having been properly fastened in its place, or by reason of the persons having charge of the car having failed to observe that it had become loosened, if such insecure condition would have been observed by proper diligence, you have a right to so presume, and you would then find, the defendant guilty of negligence. If, on the other hand, in such case you find it equally reasonable to presume that the fastening of the berth was loosened by some other person not in the employment of the company, and such insecure condition would not be observed by proper diligence on the part of the persons having charge of the car, you have the right to so presume, and in that case would find that the plaintiff had failed to make out a case of negligence against the defendant. The plaintiff is entitled to damages for injuries traceable to the defendant's fault, but not for injury caused by his own act.[48]

(2) Negligence as to the defendant is not to be presumed; but the burden of proof is upon the plaintiffs to satisfy the jury by a preponderance of evidence that the defendants are chargeable with negligence.[49]

(3) If under all the evidence submitted in the cause you shall come to the conclusion that the plaintiffs have not succeeded in establishing the fact of negligence against the defendant company by satisfactory evidence and fairly preponderating, bearing in mind that the mere fact of the explosion of this boiler is not of itself evidence of negligence, then the defendant company is entitled to the verdict.[50]

(4) Negligence is never to be presumed, and the fact that an accident occurred on October 8, 1896, would not justify the jury

[48] Railroad Co. v. Walrath, 38 Ohio St. 462.

[49] Baran v. Reading Iron Co. 202 Pa. St. 279, 51 Atl. 979.

[50] Baran v. Reading Iron Co. 202 Pa. St. 280, 51 Atl. 979.

in inferring from the fact that an explosion took place, that it was caused by the negligence of the defendant, for the reason that it might have occurred without any fault of the defendant whatever.[51]

(5) The defendants were at the time of the explosion, and before, in the exercise of a lawful right in using and operating steam boilers on their own premises in the management of this industry. Other facts establishing the fault or negligence of the owners, the defendants, besides the mere fact of the explosion itself, are necessary to be proved in order to fix a liability for damages.[52]

(6) The mere fact of the explosion of this particular boiler on the evening of October 8, 1896, standing by itself and independent of other facts, is no evidence of the company's negligence or want of proper care in the use of the boiler. It will be presumed, until the contrary appears, that this company had a care and due regard for the preservation of their own property, the safety of their own employees and others, as well as of themselves.[53]

(7) The mere fact that an explosion occurred, which caused the death of the infant in this case, is not enough to establish negligence of the defendant company. There must be additional and affirmative proof of the particular negligence which caused the explosion in this case.[54]

§ 540. **What does not amount to negligence.**—(1) It is not necessarily an act of negligence on the part of the defendant to suffer a momentary arrest of motion of the cars in bringing the train to the station and to its proper and convenient location. If such temporary arrest of motion is incident to the careful management of a mixed train like the one in question, then to suffer it would not be an act of negligence.[55]

(2) If the evidence shows the defendant to have moved the train to the station in the mode usual on well regulated roads of the country, and practiced by good conductors and engineers, the observing of such usual mode cannot be deemed an act of negligence.[56]

[51] Baran v. Reading Iron Co. 202 Pa. St. 280, 51 Atl. 979.

[52] Baran v. Reading Iron Co. 202 Pa. St. 280, 51 Atl. 979.

[53] Baran v. Reading Iron Co. 202 Pa. St. 279, 51 Atl. 979.

[54] Baran v. Reading Iron Co. 202 Pa. St. 280, 51 Atl. 979.

[55] Curtis v. Detroit & M. R. Co. 27 Wis. 161.

[56] Curtis v. Detroit & M. R. Co. 27 Wis. 161.

(3) It is not enough to say or find that there is some evidence of negligence on defendant's part. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendant, will not warrant the jury in finding a verdict for the plaintiffs. There must be evidence upon which the jury can reasonably conclude that there was negligence.[57]

§ 541. **Negligence the proximate cause of injury.**—(1) Negligence may be the proximate cause of an injury of which it was not the sole or immediate cause. If the defendant negligently encroached upon and maintained obstructions in the highway at the crossings, which, concurring with the movements of a passing train, produced the collision resulting in the death of the decedent, then such negligence would be a proximate cause of such collision within the meaning of that term as used in these instructions.[58]

(2) If you find from the evidence that croton oil was by defendant administered to the plaintiff in dangerous quantity, as is alleged, then you will consider whether or not it was the proximate cause of plaintiff's sickness and injury, as alleged; and if you find that it was not the proximate cause thereof, or if the plaintiff was sick at the time of administering the croton oil, if any was administered, and the same did not increase the sickness or pain, or the duration thereof, then you should find for the defendant.[59]

(3) No remote or speculative damages can be allowed in this action, but only such as are the natural and proximate effect of the defendant's acts.[60]

§ 542. **Instructions submitting question of negligence.**—(1) If the plaintiff did not receive the injuries complained of by any contributing act of negligence or fault of her own, but was injured at the time complained of by the carelessness and negligence or fault of the defendant's servants, or one of them, committed in the general scope of employment as such servants or servant,

[57] Curtis v. Detroit & M. R. Co. 27 Wis. 161.

[58] Lake S. & M. S. R. Co. v. McIntosh, 140 Ind. 272, 38 N. E. 476.

[59] Rabe v. Summerbeck, 94 Iowa, 659, 63 N. W. 458.

[60] Blesch v. Chicago & N. W. R. Co. 48 Wis. 172, 2 N. W. 113.

the defendant is liable for such damages as she may have sustained by the injuries thus received.[61]

(2) If the jury believe from the evidence that the plaintiff was employed to work for the firm of H & N, as stated in the declaration, and that while he was engaged in the duties of such employment he was injured and sustained damages as complained of in the declaration; that said firm of H & N were negligent in the respect charged in the declaration; that the said injury to the plaintiff was caused by said negligence of the defendants as charged in the declaration, and that the plaintiff, at the time of the injury, was in the exercise of due care and caution for his own safety, then you should find for the plaintiff.[62]

(3) If the jury believe from the evidence that the defendant is guilty of the acts of negligence charged in the declaration, and that the injury to the plaintiff complained of resulted therefrom, while he was in the exercise of ordinary care for his own safety, the defendant is liable, and the plaintiff is entitled to a verdict.[63]

(4) If the jury believe from the evidence in the case that the plaintiff, on or about the nineteenth day of May, 1893, was rightfully in an elevator in the possession of and operated by the defendant and located in the defendant's building, for the purpose of being carried thereby from one of the upper floors of the defendant's said building to the ground floor thereof; and if the jury further believe from the evidence that while the plaintiff was so in said elevator, and in the exercise of reasonable and ordinary care on his part, the said elevator, owing to the negligent and faulty construction thereof, or owing to the negligence or carelessness on the part of the servant of the defendant in operating the same, fell, and if you further believe from the evidence that the injury to the plaintiff complained of was caused by the fall of said elevator, then your verdict should be for the plaintiff.[64]

(5) If you find from the evidence that the defendant has been guilty of negligence as charged in the plaintiff's declaration, and that such negligence caused the injury to the plaintiff complained of in the declaration, and that before and at the time of such in-

[61] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 562, 14 N. E. 572.

[62] Heldmaier v. Cobbs, 195 Ill. 172, 179, 62 N. E. 853. (held not bound to anticipate defense).

[63] St. Louis N. S. Yards v. Godfrey, 198 Ill. 294, 65 N. E. 90.

[64] Hartford Deposit Co. v. Sollitt, 172 Ill. 224, 50 N. E. 178.

jury the plaintiff was in the exercise of ordinary care for her personal safety, then your verdict will be for the plaintiff.[65]

(6) The question of whether or not the defendant is guilty of negligence as charged in the plaintiff's declaration, is for your determination from all the facts and circumstances proven in the case.[66]

§ 543. **Plaintiff's contributory negligence.**—(1) The doctrine of imputed negligence does not prevail in Ohio, and if you find that G. died through the wrongful act, neglect or default of the defendant, by himself or his agent, then the plaintiff is not deprived of the right of action in this case by reason of contributory negligence on the part of the husband or any one else, unless such person was acting as agent of the deceased at the time.[67]

(2) When one is placed by the negligence of another in a situation of terror, his attempt to escape danger, even by doing an act which is in itself dangerous and from which injury results, is not contributory negligence, such as will prevent him from recovering.[68]

(3) If you find from the evidence that the plaintiff was guilty of negligence in attempting to saw the corner out while holding several of the smaller pieces together with his hands, instead of sawing the corner out of the solid piece of wood before it was ripped into smaller pieces, and if you further believe from the evidence that such negligence was the cause of his injury, then you should find the defendant not guilty.[69]

(4) If you believe from the evidence that it was necessary for H, in the discharge of his duty, to project his head from the car at K station, but that he put his head out before it was actually necessary on account of the distance of the train from the passenger platform, this would not prevent the plaintiff from recovering if otherwise entitled, if you believe that the acts of the defendant's servants in charge of the train were such as would reasonably induce the said H, situated as he was, to believe that he was

[65] Chicago C. R. Co. v. Roach, 180 Ill. 174, 54 N. E. 212.

[66] Chicago C. R. Co. v. Roach, 180 Ill. 174, 54 N. E. 212.

[67] Davis v. Guarnieri, 45 Ohio St. 478, 15 N. E. 350.

[68] Mitchell v. Charleston L. & P. Co. 45 S. C. 146, 31 L. R. A. 582.

[69] Mallen v. Waldowski, 203 Ill. 89, 67 N. E. 409. Held not assuming that the plaintiff was guilty of negligence.

at the usual place for ejecting his head in performance of his duty.[70]

(5) The law did not require defendant to anticipate or presume that plaintiff might be negligent. Defendant might lawfully presume the contrary, and might act upon the assumption that plaintiff would observe all due and proper precaution, according to the circumstances surrounding him.[71]

(6) If you find from the evidence that the ditch was dangerous, that the defendant had been guilty of permitting it to become and remain in such condition, still if you find that the plaintiff was guilty of negligence in the manner in which he attempted to cross, and that his negligence contributed to the accident, and that the accident would not have occurred if the plaintiff had exercised reasonable care, then the plaintiff cannot recover.[72]

(7) Where one knows of danger which threatens injury to himself, or where one voluntarily places himself in a dangerous place, as in a public street where horses and vehicles pass, and he can avoid such danger by reasonable exertion, his negligent failure to do so will prevent him from recovering damages for an injury so incurred.[73]

(8) If the jury find from the evidence that the plaintiff was injured by coming in contact with defendant's wire, and that by the exercise of ordinary care he could have avoided such contact, then the plaintiff is not entitled to recover anything in this action.[74]

(9) To stand in a public street, knowing that it is where wagons and horses are liable to pass, and especially to stand in such a place at night and to pay no heed to the danger of so standing and to take no care to avoid the danger of such a place, is not exercising reasonable care to protect one's self from the danger of such a place.[75]

(10) The question of whether the plaintiff was guilty of negligence which contributed to his injury, and without which the accident would not have occurred, is for the jury, and must be de-

[70] Houston & T. C. R. Co. v. Hampton, 64 Tex. 429.

[71] Curtis v. Detroit & M. R. Co. 27 Wis. 160.

[72] City of Austin v. Ritz, 72 Tex. 401, 9 S. W. 884.

[73] Evans v. Adams Ex. Co. 122 Ind. 365, 23 N. E. 1039.

[74] Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 31 L. R. A. 582.

[75] Evans v. Adams Ex. Co. 122 Ind. 365, 23 N. E. 1039.

termined from all the facts and circumstances shown by the testimony.[76]

§ **544. Plaintiff and defendant both negligent.**—(1) If the defendant or its agents could by ordinary care have avoided the consequences of the plaintiff's negligence or want of caution, or by the direct act of its agent caused the act which produced the injury, he would then be entitled to recover.[77]

(2) In this case the defendant is responsible to the plaintiff for any injury he may have received, if the defendant's negligence or the negligence of its agents or servants was the primary and proximate cause of the injury, although there may have been negligence also on the part of the plaintiff, unless it appears that under the circumstances, he could by the exercise of ordinary care, have avoided the consequences of the negligence of the defendants or its agents.[78]

(3) If you believe from the evidence that both the plaintiff and the servant of the defendant operating its car were equally guilty of negligence which directly contributed to the accident and injury complained of, then your verdict should be for the defendant.[79]

(4) Although the defendant did not exercise the degree of care required of it, yet, if the plaintiff was also at fault, and his fault contributed directly to produce the injury, he cannot recover. His right to recover, however, is not affected by his having contributed to the injury, unless he was in fault in so doing.[80]

(5) Notwithstanding the jury shall believe from the evidence that the defendant was guilty of negligence, yet if they shall further believe from the evidence that the plaintiff was also guilty of negligence, and that the accident was directly caused partly by the defendant's negligence and partly by the plaintiff's negligence, then the verdict of the jury must be for the defendant, without regard to whose negligence was the greater.[81]

(6) If you believe from the evidence that both the plaintiff and

[76] St. Louis N. S. Yards v. Godfrey, 198 Ill. 294, 65 N. E. 90.

[77] Houston, T. & C. R. Co. v. Gorbett, 49 Tex. 571; Richmond, P. & P. Co. v. Allen (Va.) 43 S. E. 356.

[78] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 576.

[79] Tillman v. St. Louis Tr. Co. (Mo. App.) 77 S. W. 321.

[80] Iron R. Co. v. Mowery, 36 Ohio St. 418.

[81] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 522, 20 Atl. 2.

the servant of the defendant operating its car were guilty of negligence which directly contributed to the accident and injury complained of, then your verdict should be for the defendant, and it makes no difference whose negligence was the greater. But if the defendant or its agents could by ordinary care have avoided the consequences of the plaintiff's negligence or want of care, the plaintiff would then be entitled to recover, notwithstanding the negligence of the plaintiff.[82]

(7) The plaintiff cannot recover, notwithstanding there may have been negligence on the part of the defendant or its agents which have contributed to the accident, if he, by the want of ordinary care, and by his own voluntary acts, so far himself contributed to the accident, that but for this fact it would not have happened.[83]

(8) If the jury are satisfied that the tenant, G, having discovered the presence of gas in an unusually large quantity in the house, or in a room of the house, did not take reasonable means and precautions to remove and exclude the gas, or, not knowing what such precautions were, did not notify the servants of the defendant that gas was escaping, or make some reasonable effort to notify them that gas was escaping into the house, and if he recklessly brought the flame of the candle into contact with the gas and air of the room, his want of care will prevent recovery on the part of the plaintiff in this case, although the jury may believe that the defendant was negligent.[84]

(9) If the plaintiff knew the dangerous condition of the roof of the room, and continued in the service in the room or remained therein, he cannot recover in this case.[85]

(10) If the plaintiff by the exercise of ordinary care could have ascertained that the part of the roof which fell and injured him was in an unsafe condition and liable to fall, and exposed himself to the danger by going thereunder, he cannot recover in this case.[86]

(11) If the defendant in this case neglected to furnish props at

[82] Tillman v. St. Louis Tr. Co. (Mo. App.) 77 S. W. 321; Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 522, 20 Atl. 2; Houston, T. & C. R. Co. v. Gorbett, 49 Tex. 571; Iron R. Co. v. Mowery, 36 Ohio St. 418; Richmond P. P. Co. v. Allen (Va.), 43 S. E. 356.

[83] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 576.

[84] Bartlett v. Boston Gaslight Co. 122 Mass. 213.

[85] Coal Co. v. Estievenard, 53 Ohio St. 56, 40 N. E. 725.

[86] Coal Co. v. Estievenard, 53 Ohio St. 56, 40 N. E. 725.

the room in which the plaintiff worked, and the roof of the room was in a dangerous condition and the plaintiff knew its condition, then the plaintiff cannot recover in this case.[87]

(12) Under the most careful circumstances mining coal is attended with danger, and persons engaged therein are presumed to incur the risks incident thereto, and if the plaintiff in this case knew, or had the means of knowing, that a part of the roof of the room in which he worked was unsafe and liable to fall he cannot recover in this case.[88]

(13) If the plaintiff, at the time he was injured, was acting by his own will and his own judgment, uncontrolled by any one connected with the mine, and if it was his duty to have determined whether or not the roof of the mine was safe to work under, and if the plaintiff was injured by his own misjudgment or negligence, he cannot recover in this action, and your verdict should be for the defendant.[89]

(14) If a part of the roof of the room in which the plaintiff worked was unsafe and liable to fall, and props were needed for its support, and the defendants neglected to furnish the props when needed, and the plaintiff had the means of knowing the roof was in that unsafe condition, and remained in the room or otherwise exposed himself to the danger from the fall of the roof, when he could have left the room, then the plaintiff cannot recover in this case.[90]

(15) If a part of the roof of the room in which the plaintiff worked was unsafe and liable to fall, and props were needed for its support, and the defendant neglected to furnish the props when needed, and the plaintiff knew the roof was in that unsafe condition, and remained in the room or otherwise exposed himself to the danger from the fall of the roof, when he could have left the room, the plaintiff cannot recover in this case.[91]

(16) If the defendant in this case neglected to furnish props at the room in which the plaintiff worked, and the roof of the room was in a dangerous condition, and the plaintiff had the means of

[87] Coal Co. v. Estievenard, 53 Ohio St. 55, 40 N. E. 725.

[88] Coal Co. v. Estievenard, 53 Ohio St. 55, 40 N. E. 725.

[89] Coal Co. v. Estievenard, 53 Ohio St. 57, 40 N. E. 725.

[90] Coal Co. v. Estievenard, 53 Ohio St. 55, 40 N. E. 725. But see Davis Coal Co. v. Polland, 158 Ind. 607.

[91] Coal Co. v. Estievenard, 53 Ohio St. 55, 40 N. E. 725.

knowing that the roof was in a dangerous condition, then the plaintiff cannot recover in this case.[92]

§ 545. Injury resulting from accident or natural cause.—(1) Although the jury may believe that the injuries to the plaintiff's property occurred at a time when the defendant was guilty of negligence, in not keeping their bulk-head, ice-breaker or other works in repair, nevertheless, if the jury also believe, from the evidence, that the defendant could not have prevented such injury by the exercise of ordinary care, then the defendant is not liable for such injuries.[93]

(2) If you find from the weight of the testimony that the sole cause of the loss was an extraordinary flood—of course, the cemetery company would not be responsible for that—your verdict should be for the defendant. If, however, the weight of the evidence satisfies you that the loss was the result of two concurrent acts, an extraordinary flood and some negligence of the said company in assisting in producing the loss, then the said company would be liable.[94]

(3) If the jury believe from the evidence that frost or extreme cold was not the sole cause of the breaking of said rail, but only contributed thereto, and the railroad track where said rail broke was in an unsafe and dangerous condition, that might have been remedied or guarded against by the exercise by defendant's employees of the highest degree of care and skill then practicable and then known to track repairers, and that such unsafe and dangerous condition of said railroad track of defendant at said point also contributed to cause the breaking of said rail jointly with the said frost and extreme cold, then the law is for the plaintiff, and he is entitled to compensatory damages.[95]

(4) If you find from the evidence that the immediate cause of the alleged disaster was the want of the proper construction of said bridge over W river, either as to size, material, piers, or the adjustment thereof, then you should find for the plaintiff, unless you should further find that the size and construc-

[92] Coal Co. v. Estievenard, 53 Ohio St. 56, 40 N. E. 725.

[93] Sterling Hydraulic Co. v. Williams, 66 Ill. 400.

[94] Helbing v. Allegheny Cemetery Co. 201 Pa. St. 172, 50 Atl. 970.

[95] Louisville & N. R. Co. v. Fox, 74 Ky. (11 Bush), 506.

tion of said bridge were right and proper for the use intended, and that the material in said bridge had been properly tested, by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and said disaster was caused by a defect in said material which could neither be foreseen nor provided against by human foresight and care, then you should find for the defendant.[96]

(5) If you find from the evidence that the accident was occasioned by a condition of things which the company could neither foresee nor provide against, then you should find for the defendant.[97]

(6) If you find from the evidence that the action complained of was occasioned by a condition of things which the defendant company could neither foresee nor provide against, then the plaintiff cannot recover. So, if you find from the evidence that the size and construction of the bridge in question were right and proper for the use intended, and that the material of the bridge had been properly tested by tests known to men skilled in such material, or could not be so tested and preserve the strength of said material, and the said disaster was caused by a defect in the material of the bridge which could neither be foreseen nor provided against by human foresight and care, then you should find for the defendant.[98]

(7) If you believe from the evidence that such injury as the plaintiff claims he has sustained could not have resulted without leaving such marked traces of deformity as would manifest itself to medical experts, so as to enable them to detect the cause of his present physical condition, aside from the mere wasted and shrunken condition of the muscles of his right arm and shoulder, and you further believe from the evidence that the wasted and shrunken condition may have resulted from simple disease without injury, and no such nor any traces of deformity can be discovered as would account for the wasting of the muscles, then you are bound to attribute it to disuse.[99]

§ 546. Negligence in the use of electricity.—(1) The degree of

[96] Bedford, S. O. & B. R. Co. v. Rainbolt, 99 Ind. 556.

[97] Beedford, S. O. & B. R. Co. v. Rainbolt, 99 Ind. 551.

[98] Bedford, S. O. & B. R. Co. v. Rainbolt, 99 Ind. 551.

[99] Allison v. C. & N. W. R. Co. 42 Iowa, 282.

care which the law requires in order to guard against injury to others varies greatly, according to the circumstances of the case; and if the jury believe that electricty was the power used by the defendant in its business, and is a highly dangerous agency to life, unless exercised with constant and extreme care, then, to such extent, a high degree of care in its supervision, management and use is required of defendant, and a failure on its part to exercise such high degree of care would be negligence.[100]

(2) If you believe that the defendant company was notified by telephone that there was trouble with its wires, and failed to take immediate steps to investigate such trouble and rectify the same, if trouble existed, and if a sufficient time between the notice to the defendant of the trouble to its wires and the accident to the plaintiff for its investigation and attention had elapsed, and thereafter, by reason of the failure of the defendant to attend to its said wires, such wire or wires charged with electricity hung suspended over the scene of the accident so as to become dangerous to persons on the street, then the defendant would be guilty of negligence. I charge you that, which, in plain words, is that if the company was notified that its wires were down, and did not take steps in a reasonable length of time to repair them, it would be guilty, if an accident occurred, in not repairing their wires in a reasonable length of time.[101]

(3) If the jury believe from the evidence that the defendant was negligent, according to the definitions given above, and that, in consequence of such negligence, the plaintiff accidently came in contact with wires charged with electricity, operated and controlled by defendant, and was injured thereby, then the plaintiff would be entitled to recover.[102]

(4) There is no evidence of any other cause of the death of the plaintiff's intestate except from the electricity coming from the wire of the defendant; therefore, if the jury find from the evidence that the death of the intestate was caused by the current

[100] Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 22 S. E. 769.

[101] Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 22 S. E. 769.

[102] Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 22 S. E. 769.

of the electricity passing into his body from the charged wire of the defendant, the jury will find that the negligence of the defendant was the proximate cause of the death of the plaintiff's intestate.[103]

§ 547. **Electric wires out of repair.**—(1) The defendant was entitled to a reasonable time, after the fall of the wire, to repair it, or remove it out of the way of persons using the street, and if you find that the injury to the plaintiff occurred before the expiration of such reasonable time, then the plaintiff is not entitled to recover anything in this action.[104]

(2) The law does not require impossibilities of any person, natural or artificial, nor does it require that the defendant should have ready for service at every moment and every point of exposure, an adequate force to overcome a sudden fracture of wire or any other like casualty in the shortest possible time. All it can be required to do in this connection is to maintain an efficient system of oversight, and to be prepared with a competent and sufficient force ready to furnish, within a reasonable time, a proper remedy for all such casualties, defects and accidents, as from experience there was any reasonable ground to anticipate might occur.[105]

(3) Although the jury may believe from the evidence in this cause that the defendant company was guilty of negligence in the manner of constructing or maintaining its electric wire over and above the track of the railroad company in question, still the plaintiff had no right to attempt to pass from one car to another while the cars were passing under the said wire, if in so doing he increased the danger of an accident from the said wire, and if, from the evidence, the jury believe that the plaintiff did attempt to pass from one car to another while passing under said wire, and by so doing did increase the danger and chance of the accident, he cannot recover in this case, and the jury must find for the defendant.[106]

(4) If the jury find from the evidence that the accident complained of by the plaintiff was caused solely by hidden or latent

[103] Mitchell v. Electric Co. 129 N. Car. 173, 39 S. E. 801.

[104] Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 22 S. E. 769.

[105] Mitchell v. Charleston L. & P. Co. 45 S. Car. 146, 22 S. E. 769.

[106] Danville St. Car Co. v. Watkins, 97 Va. 717, 34 S. E. 884.

defect—not apparent to the eye—in the trolley wire of the defendant, and that the defendant could not have discovered or detected it by any reasonable examination by the defendant or its agents, and the jury further find that the defendant company employed such proper and suitable contractors to erect the trolley wire and over-head construction at the place of the accident; and that such contractors used suitable material and a proper and skillful method of over-head construction of the place of the accident, then defendant has performed its duty to the passenger in this regard, and the verdict must be for the defendant, even though the jury further find that the plaintiff, without fault on his part, did receive injuries by reason of the breaking and falling of said trolley wire.[107]

[107] Baltimore City P. R. Co. v. Nugent 86 Md. 351, 38 Atl. 779.

CHAPTER XL.

NEGLIGENCE OF CARRIERS.

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§ 548. **Negligence of carrier presumed—Burden.**—(1) When injury or damage happens to a passenger (on a railroad) by a collision, or by any other accident occurring on the road, the prima facie presumption is that it occurred by the negligence of the railroad company, and the burden of proof is on the company to establish that there has been no negligence whatsoever, and that the damage has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent.[1]

(2) If the jury find from the evidence that the plaintiff, while a passenger on one of the defendant's cars, and while exercising ordinary care, was shocked and knocked off said car and injured by coming in contact with the end of a broken trolley wire used by defendant in the operation of their railway, then their verdict must be for the plaintiff, unless they shall further find that by the exercise of that high degree of care required by reason of the well known dangerousness of the agency employed, the defendant could not have prevented the injury complained of.[2]

(3) If the jury believe from the evidence that the plaintiff was a passenger on one of defendant's cars, and while exercising reasonable care and diligence with respect to his own safety, the car started with a sudden and violent jerk, causing the injury now being inquired into, then the burden is thrown upon the defendant to show, to the satisfaction of the jury, that the horses hitched to the car were suitable for the service in question, or that the accident was not due to the horses, and that the servant of defendant managing the car exercised the utmost care, skill and foresight in the management of the same, or that the accident occurred by reason of some cause not under the control of defendant, or its servants and employés; and unless the defendant has so satisfied the jury, their verdict should be for the plaintiff.[3]

§ 549. **High degree of care required of carriers.**—(1) While a common carrier of passengers is not an insurer of their lives, still, in consideration of the great danger to human life conse-

[1] Shenandoah Val. R. Co. v. Moore, 83 Va. 828, 3 S. E. 796.

[2] Baltimore City P. R. Co. v. Nugent, 86 Md. 350, 38 Atl. 779.

[3] Dougherty v. Missouri R. Co. 97 Mo. 647, 8 S. W. 900.

quent upon the neglect of duty upon the part of the carrier, the law exacts of it the exercise of the highest practicable care for the safety of its passengers in the operation of its cars and stopping and starting its cars to enable passengers to get on and off the same, and for any failure to exercise such care and for slight neglect of its duty in this respect, resulting in an accident or injury, it is liable to a passenger who is herself without fault for an injury sustained as the proximate result of such negligence.[4]

(2) A common carrier of passengers, such as a street car company, is bound to use the highest degree of care for the safety of its passengers and persons attempting to become passengers on its cars.[5]

(3) Negligence, when applied to carriers of passengers, means the absence in the performance of a duty imposed by law for the protection of others, of that high degree of care, in acting or refraining from acting, which very cautious, prudent and competent persons usually exercise under like circumstances.[6]

(4) Railway companies, in transporting passengers upon their trains operated and managed by their employés, must, while thus transporting such passengers, exercise a high degree of care in order to avoid accident or injury to such passengers, and the failure to exercise such care as a person of ordinary prudence, under like circumstances would use, is negligence.[7]

(5) The right of the plaintiff to recover in this case will be submitted to you from two aspects, viz.: (1) Was S at the time a passenger on defendant's train? or (2) was he a trespasser? The law imposes upon the defendant company the duty of exercising the highest degree of care towards him if he was a passenger for pay on defendant's cars at the time; but if he was a trespasser on the defendant's train, the law imposes only the duty of ordinary care for his safety after discovering that he was such trespasser. Now, if from all the facts and circumstances before you, you find that at the time S was killed he was a passenger on defendant's cars, and that his death

[4] Indianapolis St. R. Co. v. Brown (Ind.), 69 N. E. 408.

[5] Tillman v. St. Louis Tr. Co. (Mo. App.), 77 S. W. 320.

[6] Houston & T. C. R. Co. v. Dotson, 15 Tex. Cv. App. 73, 38 S. W. 643; Missouri, K. & T. R. Co. v. White, 22 Tex. Cv. App. 424, 55 S. W. 593.

[7] Gulf, C. & S. F. R. Co. v. Wilson, 79 Tex. 371, 15 S. W. 280.

was caused or occasioned by the carelessness of those in charge of the train at the time; that is, if you find that the head-end collision which resulted in S's death was brought about through the carelessness and negligence and want of proper care on the part of those operating the trains at the time, then the defendant company would be liable in this case. If you find and believe that S at the time was a trespasser on defendant's train, that he at the time was riding on what is commonly known as the "blind baggage," endeavoring to travel without paying for his passage; and you further find and believe that a person of ordinary prudence and caution would not have been in such position, and would not have acted as S did at the time he boarded the train, then, if you find this to be the case, the defendant company would not be liable, unless you further find and believe that the servants and agents of the defendant company knew of his position before the accident, and could have prevented the accident by the exercise of ordinary care.[8]

(6) It is the duty of common carriers to do all that human care, vigilance and foresight can reasonably do under the circumstances and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries, and if they neglect so to do, they are to be held strictly responsible for all consequences which flow from such neglect; that while the carrier is not an insurer of the absolute safety of the passenger, it does, however, in legal contemplation, undertake to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger, if the passenger is, at the time of the injury, exercising ordinary care for his or her safety; and this care applies alike to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties.[9]

(7) Common carriers of persons are required to do all that human care, vigilance and foresight can reasonably do, consistent with the character and mode of conveyance adopted, and the prac-

[8] Southerland v. Texas, &c. R. Co. (Tex. Cv. App.) 40 S. W. 195.

[9] Chicago & A. R. Co. v. Byrum, 153 Ill. 131, 133, 38 N. E. 578.

ticable prosecution of the business to prevent accidents to passengers riding upon their trains or alighting therefrom.[10]

(8) If the plaintiff was a passenger upon the defendant's road in one of the defendant's coaches, as alleged in the complaint, the defendant's obligation was to carry her safely and properly; and if the defendant entrusted this duty to the servants of the company, the law holds the defendant responsible for the manner in which they execute it. The carrier is obliged to protect its passengers from improper and unnecessary violence at the hands of its own servants. And it is the established law that a carrier is responsible for the negligence and wrongful conduct of its servants, suffered or done in the line of their employment whereby a passenger is injured.[11]

(9) A carrier of passengers for pay is responsible for injuries sustained by a passenger through the neglect, recklessness and carelessness of the servants of such carrier, while they are engaged in the general scope of their employment, whether the act was or was not authorized by the carrier.[12]

(10) It is the duty of a railroad company to convey its passengers safely, and it is the duty of the employés of the railroad company to exercise care and diligence in the performance of their respective duties, and any omission or failure to discharge fully all the obligations incumbent upon said employés is negligence and if a passenger suffers injury by such negligence, the railroad company is liable therefor.[13]

(11) The degree of care which defendant and its employés were bound to exercise towards plaintiff (if you find from the evidence he paid his fare as a passenger at any time during his said trip on the car, as he alleges) was this: Defendant was bound to run and operate its cars with the highest degree of care of a very prudent person, in view of all the facts and circumstances at the time of the alleged injury.[14]

(12) If the jury believe from the evidence in this case that on or about the 16th day of February, 1880, the defendant was con-

[10] Chicago & A. R. Co. v. Byrum, 153 Ill. 134, 38 N. E. 578; Chicago, &c. R. Co. v. Bundy, 210 Ill. 47.

[11] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 560, 14 N. E. 572.

[12] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 560, 14 N. E. 572

[13] International & G. N. R. Co. v. Eckford, 71 Tex. 274, 8 S. W. 679.

[14] O'Connell v. St. Louis, C. & W. R. Co. 106 Mo. 483, 17 S. W. 494

trolling and operating a train of cars on a railroad in this country, and that the defendant received the plaintiff on its cars as a passenger, for hire, then the court instructs the jury that the defendant was bound to make up its train, couple its cars and engines in such a careful, skillful and prudent manner as to carry the plaintiff with reasonable safety as such passenger.[15]

(13) If the jury believe from the evidence that the plaintiff was at the time of the event in question a passenger on one of defendant's cars, then the defendant owed to the plaintiff the duty of exercising the utmost care and vigilance to carry him over its road safely, and is responsible to the plaintiff for any neglect or want of proper care which the jury may find from the evidence, if they so find, causing the injury in question arising from the management of the car and horses by the defendant's servants or employés, or from the use of skittish or unsuitable horses causing the injury in question.[16]

(14) It is the duty of a railroad company to use due care, not only in conveying its passengers upon their journey, but also in all preliminary matters, such as their reception into the car and their accommodation while waiting for it; and whether bound to render assistance in taking passengers aboard its cars or not, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering.[17]

(15) When the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, but suffers or directs passengers to enter at out of the way places, it is its duty to use the utmost care in preventing accidents to passengers while entering the car.[18]

(16) It is claimed on the part of the plaintiff that the track was out of repair in consequence of the defendant's neglect to remove decayed and unsound ties, and supply them with sound ones: that it was the duty of the defendant to take due care to see that the ties in use are not permitted to decay to such extent as to endanger the safety of its passengers, and omission of this duty is a negligent failure to keep the road in proper repair. It is

[15] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 219, 225. Held proper and not assuming facts.

[16] Dougherty v. Missouri R. R. Co. 97 Mo. 656, 8 S. W. 900.

[17] Allender v. C. R. I. & P. R. Co. 43 Iowa, 277.

[18] Allender v. C. R. I. & P. R. Co. 43 Iowa, 277.

for you to say, in the light of the evidence, whether or not the defendant was guilty of negligence in regard to the ties at the accident in question.[19]

§ 550. Carrier liable, though negligence only slight.—(1) The law, in tenderness to human life and limb, holds railroad companies liable for the slightest negligence, and compels them to repel by satisfactory proofs every imputation of such negligence. When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carrier liable.[20]

(2) If the injury to the plaintiff was occasioned without her fault, by the least negligence or want of skill or prudence on the part of the defendant or its employés in charge of the train, the company is liable.[21]

(3) A common carrier of passengers is bound to use the utmost care and diligence for the safety of passengers, and it is liable for an injury to a passenger occasioned by the slightest neglect against which prudence and foresight might have guarded.[22]

(4) The greatest care and diligence are required of a railroad company as a common carrier of passengers conveyed by means of steam-cars. If a passenger receives an injury without his fault, by the least negligence or want of skill on the part of such carrier or its employés in charge of the train, against which prudence and foresight might have guarded, the law holds the carrier liable for such injury. And in this case if you believe from the evidence that the plaintiff, without any fault on his part, was injured as charged in his declaration, by the slightest negligence of the defendant company, then he is entitled to recover for such injury.[23]

(5) It is the duty of stage proprietors, who run a line of coaches for the conveyance of passengers, to provide good coaches, harness and horses, and good, skillful and careful drivers, and should they fail to do so, and their passengers are injured by

[19] Andrews v. Chicago, M. & St. P. R. Co. 86 Iowa, 681, 53 N. W. 399.

[20] Shenandoah V. R. Co. v. Moore, 83 Va. 827, 3 S. E. 796.

[21] Curtis v. Detroit & M. R. Co. 27 Wis. 158.

[22] Reynolds v. Richmond & M. R. Co. 92 Va. 401, 23 S. E. 770.

[23] Curtis v. Detroit & M. R. Co. 27 Wis. 158; Shenandoah V. R. Co. v. Moore, 83 Va. 823, 3 S. E. 796; Reynolds v. Richmond & M. R. Co. 92 Va. 401, 23 S. E. 770.

such failure, the proprietors are responsible. They are not only to furnish good coaches, harness, horses and skillful and careful drivers, but they are to keep them in good repair, and are to see that their drivers drive with the utmost skill and prudence. Carriers of passengers for hire are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skill either in themselves or their servants. They are bound to use such care and diligence as a most careful and vigilant man would observe, in the exercise of the utmost prudence and foresight.[24]

§ 551. Care of passenger—Ordinary care.—(1) The degree of care required of a passenger is not the highest degree of care, but only the ordinary care which ordinarily prudent people are accustomed to exercise.[25]

(2) If the plaintiffs, in taking the train in question, acted as persons of common sense and ordinary prudence and intelligence usually act in like cases, then there was no such negligence on their part as would prevent a recovery by them in this action.[26]

(3) The plaintiff, as a passenger, was not required by law to exercise extraordinary care or manifest the highest degree of prudence to avoid injury. All the law required of him while traveling as a passenger was, that he should exercise ordinary care and prudence for his safety, such as ordinarily careful persons would exercise under the same circumstances as those shown in evidence.[27]

(4) The question of whether or not the plaintiff exercised ordinary care for her personal safety before and at the time of the occurrence of the injury complained of, is a question of fact to be determined by you from the evidence.[28]

(5) The plaintiff, as a passenger, was not required by law to exercise extraordinary care or manifest the highest degree of prudence to avoid injury. All the law required of him while traveling as a passenger was that he should exercise ordinary care and prudence for his safety, such as ordinarily careful persons

[24] Sales v. Western Stage Co. 4 Iowa, 547.

[25] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 521, 20 Atl. 2.

[26] Curtis v. Detroit & M. R. Co. 27 Wis. 159.

[27] West C. St. R. Co. v. McNulty, 166 Ill. 203, 205, 46 N. E. 784.

[28] Chicago C. R. Co. v. Roach, 180 Ill. 174, 54 N. E. 212.

would exercise under the same circumstances. And whether the plaintiff did or did not exercise ordinary care for his personal safety before and at the time of the occurrence of the injury complained of, is a question of fact to be determined by you from the evidence before you.[29]

(6) The jury are instructed by reason of its convenience to the public as a carrier of passengers, and because of the inability of its cars to turn out, that a street railway company is invested with the right of way over other vehicles over and upon the portion of the street occupied by its tracks, and it is the duty of the driver of such vehicles to turn out and allow its cars to pass, and to use care not to obstruct and delay the same, and if the jury believe from the evidence that the plaintiff, while neglecting such duty and failing thereby to use ordinary care for his own safety, was injured, then he cannot recover in this case.[30]

(7) Though the jury may believe from the evidence that the plaintiff informed the conductor that she wanted to get off at Ninth street, and although the car stopped before reaching Ninth street, yet, if the jury believe that such stop was not made for passengers to alight, but for the gripman to await the signal from the watchman to cross Ninth street, and if the plaintiff was told not to get off at that place, but she did get off, and in so doing was thrown down and injured, then she cannot recover in this action, and your verdict will be for the defendant.[31]

§ **552. Carrier bound to carry sick persons.**—(1) A common carrier of passengers is bound to carry and transport for hire persons who are sick, weak, debilitated or predisposed to disease, as well as those who are healthy and robust; and if you find from the evidence that the plaintiff received the injuries complained of, or any of them, in the manner alleged in the complaint, and that at the time of receiving said injuries, or any of them, the plaintiff was predisposed to malarial, scrofulous or rheumatic tendencies, so that thereby without the fault of the plaintiff her present condition, whatever you may find that

[29] West C. St. R. Co. v. McNulty, 166 Ill. 205, 46 N. E. 784; Chicago C. R. Co. v. Roach, 180 Ill. 174, 54 N. E. 212; Curtis v. Detroit & M. R. Co. 27 Wis. 159.

[30] North Chicago E. R. Co. v. Penser, 190 Ill. 67, 70, 60 N. E. 78.

[31] Jackson v. Grand Ave. Ry. Co. 118 Mo. 216, 24 S. W. 192.

to be, has directly resulted, then you are instructed that the plaintiff is entitled to recover to the full extent of whatever you may find her present condition to be.[32]

§ 553. **Drunkenness of passenger, not negligence.**—(1) Intoxication on the part of the plaintiff, if the jury believe that the plaintiff was intoxicated, is not, as a general rule, in itself, as a matter of law, such negligence or evidence of such negligence as will bar his recovery in this action. The law refuses to impute negligence as, of course, to a plaintiff from the bare fact that at the moment of suffering the injury he was intoxicated. Intoxication is one thing and negligence sufficient to bar an action for damages quite another thing. Intoxicated persons are not removed from all protection of law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, then his intoxication, if you believe from the evidence he was intoxicated, had nothing to do with the accident. When contributory negligence is one of the issues, as in this case, it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care—not whether or not the plaintiff was drunk.[33]

(2) If you find from the evidence that the deceased on the night of June third and the morning of June fourth had used intoxicating drink, as testified to by conductor P and witnesses Y and H, but shall further find that he was not drunk when he crossed the defendant's track at W, such use of intoxicating drink is not evidence from which the jury may infer the want of ordinary care and prudence on his part.[34]

§ 554. **Injury to postal clerk on mail car.**—(1) If you find from the evidence that B, the plaintiff's decedent, was a postal agent in charge of the United States mail, being carried by the defendant company on its railroad, and that the car in which said B and the said mail were being carried, ran off the railway

[32] Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 426, 3 N. E. 389.

[33] Denver Tramway Co. v. Reid, 4 Colo. App. 53, 35 Pac. 269.

[34] Baltimore & O. R. Co. v. S. &c. 60 Md. 452.

track, thereby killing the said B without any fault on his part, such facts would make a prima facie case of negligence, and would entitle the plaintiff to a verdict, unless you find that the defendant and those from whom it procured its cars had used due care in constructing such cars, and had from time to time carefully inspected the same to see if they remained in proper order, and had failed to find any defects in the same which contributed to said injury.[35]

(2) If you believe from the evidence that on the 20th day of August, or at any time within one year next before the 25th day October, 1887, a train of cars operated by the defendant, its agents, servants or employés, was wrecked, and that at the time of such wreck the plaintiff was traveling upon said train of cars as postal or mail clerk in the employment of the United States government and in charge of the mail matter of said train, then he would be entitled to recover of the defendant for such injuries as he may have received, provided they are the injuries set forth in his petition, resulting from the negligence (if there was negligence) of the servants, agents or employés of the defendant, not to exceed the amount of either kind of injury alleged in the different averments in the plaintiff's petition.[36]

(3) If the plaintiff was riding in the mail car, composing a part of said train, and in his proper place in said car, then the fact, if such be a fact, that it was a more dangerous place in which to travel than other cars composing said train, would in no way affect the right of plaintiff to recover in this cause.[37]

§ 555. Injury to passenger on freight car.—(1) If the jury find that previous to and on the night in question the train in question had been and was carrying passengers and receiving fare, and if the jury shall believe from all the facts and circumstances that the persons in consequence of this went there to take said train, they were neither trespassers nor outlaws. And if said persons were conducting themselves in a prudent and proper manner in attempting to get aboard the train, and the boy in question was injured in consequence of the want of

[35] Ohio & M. R. Co. v. Voight, 122 Ind. 288, 23 N. E. 774.

[36] Gulf, C. & S. F. R. Co. v. Wilson, 79 Tex. 374, 15 S. W. 280.

[37] Gulf, C. & S. F. R. Co. v. Wilson, 79 Tex. 375, 15 S. W. 280.

ordinary skill and care on the part of the employés of the defendant, then the defendant is liable.[38]

(2) If you should find from the testimony that the night freight train in question was usually made up and started from the place where it stood when the party having charge of the plaintiff attempted to go on board, and that the defendant company, its agents or servants, had previous to and about that time carried such passengers in this night train to and from M as went aboard on their own accord, or upon application to some person having charge of the train, collecting from such person the usual fare of passengers, and further find that the caboose on the night in question, and at the time the party having charge of the plaintiff went aboard, was open for passengers, you will be warranted in finding a verdict for plaintiff, if you still further find the absence of negligence upon the part of said party in the care bestowed upon the boy, and the existence of negligence at the time upon the part of the employés of the defendant having charge of the train.[39]

§ 556. Ordering or putting passenger off moving train.—(1) If the jury find from the evidence that the plaintiff was a passenger on defendant's train for K, and, on arriving there, the conductor or agent called out the name of the station and directed the plaintiff to get off said train without first stopping it, and that the platform at that station was unsafe and of insufficient length for the safe landing of passengers, and that the plaintiff got off the train under the directions of the defendant's conductor, agent or employé, and, in doing so, was injured, on account of not stopping said train in time, or on account of such unsafe or insufficient platform, the defendant is liable.[40]

(2) If the jury find from the evidence that the plaintiff was ordered or directed by the defendant's conductor or employés to get off the train, and told to hurry up, and such orders and directions would cause a man of ordinary reason to believe that he must leave the train, or submit to the inconvenience

[38] Lucas v. Milwaukee & S. P. R. Co. 33 Wis. 51.

[39] Lucas v. Milwaukee & St. P. R. Co. 33 Wis. 50.

[40] St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 522.

of being carried past the station, and that the plaintiff in getting off the train was injured, the defendant is liable, provided that they find that the act of getting off the train was a careful and prudent act, and not a rash and careless exposure to peril and hazard.[41]

(3) Before the jury can find for the plaintiff, on the ground that the agent or other employé of the defendant directed or advised the plaintiff to get off the train, they must find from the evidence that such directions or advice were given at a time and in a manner that would have induced the belief in the mind of a man of ordinary reason that such agent meant and itended that he should get off at the time and under the circumstances existing at the time he did get off.[42]

(4) If the fact be that defendant's conductor, having charge of the train upon which plaintiff was a passenger, seized hold of her while the train was in motion and was moving on, and pulled her from the platform of the coach by the exercise of physical force, and thereby caused her to strike the ground or other hard substance below, whereby she was injured, she would not be guilty of contributing to injuries received thereby.[43]

(5) If the jury believe from the evidence that the injury to the plaintiff would have been prevented if the defendant or its employés had used reasonable care and caution in the place and manner in which the plaintiff was put off the train, and that it did not use such care and caution, under all the circumstances of the case, they will find for the plaintiff the full amount of her injury and damage that may be shown by the evidence.[44]

§ 557. **Willful ejection of passenger from train.**—(1) The gist of this action is the alleged wrongful ejection of the plaintiff from the defendant's car. He cannot recover upon proof of mere negligence. The cause of action alleged by the plaintiff is not for negligence, and does not require proof of plaintiff's freedom from negligence. The plaintiff's only right of recovery

[41] St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 522.

[42] St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 523.

[43] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 562, 14 N. E. 572.

[44] Georgia P. R. Co. v. West, 66 Miss. 312, 6 So. 207.

under his complaint is for willful injury, if proven. A willful injury is that which flows from an injurious act purposely committed with the intent to commit injury. In determining whether the injury, if any, was committed willfully, you may consider with the other circumstances of the case the manner of the conductor, the force, if any, used by him and the effect of his acts, together with the presumption that every person intends the natural and probable consequences of his wrongful acts; and an unlawful intent may be inferred from the conduct which shows a reckless disregard of consequences and a willingness to inflict injury by purposely and voluntarily doing the act, with the knowledge that some one is in a situation to be unavoidably injured thereby.[45]

§ 558. **Plaintiff a trespasser—Not a passenger.**—(1) Before the plaintiff is entitled to recover in this action, it must appear by a fair preponderance of the evidence that at the time of the injury, if any, he was a passenger on the defendant's train of cars, and not a trespasser. If he was a trespasser he cannot recover, and you should find for the defendant.[46]

(2) The plaintiff cannot recover as a passenger of the defendant without showing that he occupied that relation.[47]

(3) Although the jury may believe that A, the plaintiff, had no business or right to be on defendant's train, and was a trespasser thereon, yet, if they further believe that he was given no reasonable opportunity to get off the train without exposing himself to danger, but was forced to leave the train while the same was in motion, by reason of force exercised by the employés of said company, or any of them, within the scope of their employment, and that in so leaving he received the injuries complained of, they must find a verdict for the plaintiff.[48]

(4) If it appear that H was not a passenger at the time of the injury, the defendant is only bound to the use of ordinary care, and is responsible only for gross negligence. Ordinary care is that degree of care which a prudent man would exercise about his own affairs.[49]

[45] Citizens' St. R. Co. v. Willoeby, 134 Ind. 567, 33 N. E. 627.

[46] Pfaffenback v. Lake S. & M. S. R. Co. 142 Ind. 251, 41 N. E. 530.

[47] Lucas v. Milwaukee & St. P. R. Co. 33 Wis. 50.

[48] Chesapeake & O. R. Co. v. Anderson, 93 Va. 651, 25 S. E. 947.

[49] Huelsenkamp v. Citizens' R. Co. 37 Mo. 540.

(5) If it appear that H was not a passenger, and that he did not in any manner, by his own negligence, contribute to the injury, still the plaintiff cannot recover, unless it appear that the injury and death were caused by the gross negligence of defendant or its agents.[50]

§ 559. **Children trespassers—Getting on cars.**—(1) If the plaintiff, at the time of the injury complained of, was a child of tender age of seven years, and was riding upon the defendant's car in the city of R while the same was in motion, and that the defendant's servants in charge of said car knew of his presence on the car and ordered him to get off, it was their duty to have reduced the speed of the car before ordering the plaintiff to leave it, to such a rate of speed as the plaintiff might depart from the car with safety, notwithstanding the jury may believe that the plaintiff was, at the time, a trespasser upon the defendant's car. But in order to find for the plaintiff, the jury must believe that the order of the conductor was given in such a manner as to frighten or intimidate the plaintiff to such an extent as to cause him to jump from the car while it was in motion, taking into consideration the age and capacity of the plaintiff.[51]

(2) If the jury further believe from the evidence that the employés of the defendant knew, or could have known by the exercise of ordinary care, the plaintiff was on said car, in a dangerous situation or position, considering his age and experience and understanding, then it was their duty to slow up sufficiently to permit the plaintiff to leave said car in safety, if the same was in motion, and if the said car had not been started, not to start the same until the plaintiff had gotten to a place of safety; and if the jury believe from the evidence that the injury complained of resulted to the plaintiff from the failure of said employés in either one of these particulars, they must find for the plaintiff, provided they believe from the evidence that the plaintiff exercised such a degree of care and caution as under the circumstances might reasonably be expected from one of his age and experience.[52]

[50] Huelsenkamp v. Citizens' R. Co. 37 Mo. 540.

[51] Richmond Tr. Co. v. Wilkinson (Va.), 43 S. E. 624.

[52] Richmond Tr. Co. v. Wilkinson (Va.), 43 S. E. 623.

(3) If the jury believe from the evidence that the motorman or conductor knew or could have known by the exercise of reasonable care that when the car was about to start off on its return trip that the plaintiff occupied a dangerous position for a child of tender years, then it was the duty of the said conductor and motorman not to start the car while the plaintiff was so occupying said position; and if they believe from the evidence that they did so, negligence may be imputed to the defendant, if the jury believe that the accident was occasioned by such negligence; provided the jury shall believe from the evidence that the plaintiff exercised such a degree of care and caution as, under the circumstances, might reasonably be expected from one of his age and intelligence.[53]

(4) If the jury shall believe from the evidence that the plaintiff was injured by jumping from a moving train of the defendant whilst being propelled through the streets of the city of A, at the unlawful rate of speed of from ten to twelve miles per hour, and that the plaintiff's act of jumping from the train was caused by the orders of the defendant's motorman or conductor in charge of the train, then they may find for the plaintiff; provided the jury shall believe that the plaintiff, by reason of his age and want of judgment and discretion, was unable to exercise sufficient care and caution to resist the orders of the defendant's said motorman.[54]

(5) Although the jury may find from the evidence that at the time of the accident to the plaintiff defendant's train was running at a greater rate of speed than five miles an hour, that would not justify a recovery in this case in favor of the plaintiff, unless the jury further find that the plaintiff, taking into consideration his age and experience and understanding, by reason of the threatening language of the motorman, had reasonable ground for believing that the motorman intended to inflict physical violence upon the plaintiff or to eject him from the car, or so terrorized the plaintiff as to compel him, against his will, to jump from the car.[55]

[53] Richmond Tr. Co. v. Wilkinson (Va.), 43 S. E. 624.

[54] Washington, A. & Mt. V. Elec. R. Co. v. Quayle, 95 Va. 747, 30 S. E. 391.

[55] Washington, A. & Mt. V. Electric R. Co. v. Quayle, 95 Va. 745, 30 S. E. 391.

(6) Although the jury may believe from the evidence that the motorman called to the plaintiff and his companions to get off the car, yet, to entitle the plaintiff to recover in this action, the jury must believe that said call of the motorman was of such a threatening character as to justify the belief in the mind of the plaintiff, taking into consideration his age, that the motorman intended to do him bodily harm or to eject him from the said car while it was in motion, and the plaintiff, through fear of such threat, jumped from the car and was injured; and that the jury must further believe that it was within the scope of the duty of said motorman to order the plaintiff to get off said car.[56]

(7) If plaintiff at the time of the injury was a child of the tender age of thirteen years, and was riding upon the defendant's car in the city of A, whilst the same was traveling at a fast rate of speed, then it was the duty of the defendant's motorman in charge of said train to have reduced the speed of said train, before ordering the plaintiff to leave the same, to such a rate of speed as that the plaintiff might depart from the train with safety, notwithstanding the jury may believe that the plaintiff was at the time a trespasser upon the defendant's car.[57]

§ 560. **Passenger assisting in pushing car.**—(1) If the plaintiff was requested by the driver of the car to assist in pushing it back, and he did so assist and in doing so was injured by the negligence or carelessness of the driver of the car on which he had been riding, or of another car, he can recover if such assistance was apparently necessary. Or if there was an actual necessity for him to assist the driver in pushing back the car, and he did so assist, and while doing so was injured by the negligence of the driver of either this car or another, he can recover, whether he was requested by the driver to do so or not.[58]

§ 561. **Passenger getting off a moving train.**—(1) If the jury believe from the evidence in this cause that the defendant's train did not stop at the station at K long enough to enable the plaintiff, A, to leave the car and reach the platform while the train

[56] Washington, A. & Mt. V. Electric R. Co. v. Quayle, 95 Va. 744, 30 S. E. 391.

[57] Washington, A. & Mt. V. Electric R. Co. v. Quayle, 95 Va. 747, 30 S. E. 391.

[58] Street R. Co. v. Bolton, 43 Ohio St. 226, 1 N. E. 333.

was stationary, and that she stepped off therefrom on the platform while the train was in motion, it is a question for the jury to say whether she was guilty of negligence, as above defined, and barred thereby from a recovery for the injuries received.[59]

(2) A passenger upon a railroad train is entitled to a reasonable time to leave or alight from the car in which he is riding when a train is stopped for that purpose, and when reasonable time is not in fact given in which to alight in safety, if, in attempting to do so, injuries result to him, he is entitled to recover from the railroad company for such injuries, unless in doing so he is guilty of criminal negligence, as elsewhere defined in these instructions, or unless in doing so he is violating some express rule or regulation of said railroad actually brought to his notice.[60]

(3) If, from the evidence in this case, you find that defendant's train did not stop at the station at E long enough to enable the plaintiff to leave the car in which she was riding, and reach the platform while the train was standing and before it was again started, and that she was thrown or precipitated therefrom, or that she stepped therefrom onto the depot platform after the train was started and was in motion, it is for you to say, upon consideration of all the evidence upon that question, whether she was guilty of criminal negligence as elsewhere defined in these instructions.[61]

(4) Should you find that defendant's train did not stop at E station long enough to enable the plaintiff to alight from the car in which she was riding, and that she was not guilty of such gross or criminal negligence as here defined in attempting to alight while the train was in motion, you should next determine from the testimony whether or not the plaintiff, at the immediate time of the injury in question, was guilty of violating any express rule or regulation of the defendant company for the

[59] Little Rock & Ft. S. R. Co. v. Atkins, 46 Ark. 430.

[60] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 148, 49 N. W. 1114. This instruction is based upon a statute relating to criminal negligence.

[61] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 148, 49 N. W. 1114. This instruction is based upon a statute defining criminal negligence.

safety of passengers upon its trains and whether she had actual notice of such rule or regulation.[62]

(5) Should you find from the testimony that the train on which the plaintiff was riding did not stop at the E station a sufficient time to permit plaintiff to alight therefrom, and that she afterwards attempted to step or leap therefrom while said train was in motion, you should next determine whether she was, in trying to alight while the train was in motion, guilty of such gross or criminal negligence as is defined in the last paragraph.[63]

(6) If the plaintiff alighted from said car while the same was in motion and going at such rate of speed that a person of ordinary care and prudence would not have alighted under the circumstances, then she was guilty of contributory negligence, and cannot recover in this cause, whether the defendant was negligent or not, and if you find from the evidence that she did so alight, then your verdict will be for the defendant.[64]

(7) If you believe from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car while it was in motion and fell into the street, then he cannot recover damages, and your verdict should be for the defendant.[65]

§ 562. **Plaintiff negligent in getting off train.**—(1) If the jury believe from the evidence that the plaintiff attempted to step from the platform of the coach of defendant to the platform at B., while the train of defendant was in motion, and that under the circumstances of this case, the train being in motion, the age, sex of plaintiff, and other surrounding circumstances, the attempt to get from the train was hazardous, and not one that a person of ordinary prudence under similar situation or circumstances would have made, they will find for the defendant.[66]

(2) If you find from the evidence that defendant's train stopped a sufficient length of time to enable plaintiff to leave it, and further find that plaintiff neglected to leave it while so stopped, but carelessly and negligently jumped from it after it was put in

[62] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 147, 49 N. W. 1114.

[63] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 146, 49 N. W. 1114.

[64] Jackson v. Grand Ave. R. Co. 118 Mo. 216, 24 S. W. 192.

[65] Omaha St. R. Co. v. Boeson (Neb.), 94 N. W. 619.

[66] Georgia P. R. Co. v. West, 66 Miss. 314, 6 So. 207.

motion, and that by reason of so leaving the train the injury, if any, was caused, then he would not be entitled to recover.[67]

(3) If, from the evidence, you believe that the defendant's servants were guilty of negligence in starting the train too soon as alleged, yet if you believe from the evidence that the plaintiff was also guilty of negligence at the time and in the manner of his leaving the train, and that he would not have sustained any injury (if you believe he did sustain such injury) if he had not himself been guilty of negligence which directly contributed to the alleged injury, then you will find for the defendant, although you may believe that the train did not stop long enough for the plaintiff to get off.[68]

(4) The fact, if you find it to be a fact, that the defendant's train did not stop at the station long enough to enable the plaintiff to alight therefrom, would not of itself excuse the plaintiff or justify her stepping from the train while in motion.[69]

(5) Should you, however, find that the plaintiff had a reasonable and sufficient time to alight from said train and reach the depot platform in safety while said train was at rest, then the defendant would not be liable in the action, and you should so find.[70]

(6) If the jury believe from the evidence that plaintiff was a passenger on the train of defendant from F to B, and that defendant in transporting the plaintiff used due and proper care for her safety and gave her reasonable time at B to alight from defendant's train, and that the injury complained of by the plaintiff was not occasioned by the negligence of defendant, its servants or employés, they will find for defendant.[71]

(7) If the jury find that the defendant's cars passed the platform of the station where the plaintiff, a passenger, was to have gotten off, and stopped some distance beyond said platform, and the said plaintiff then and there, voluntarily, and without any direction or command of any of the persons in charge of said train got off the car with the assistance of the conductor and brake-

[67] Gulf, C. & S. F. R. Co. v. Rowland, 90 Tex. 365, 38 S. W. 756.

[68] Gulf, C. & S. F. R. Co. v. Rowland, 90 Tex. 366, 38 S. W. 756.

[69] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 148, 49 N. W. 1114.

[70] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 146, 49 N. W. 1114.

[71] Georgia P. R. Co. v. West, 66 Miss. 312, 6 So. 207.

man, and was not injured in thus getting off, the plaintiffs are not entitled to recover.[72]

(8) Even though you should believe from the evidence that the plaintiff was guilty of contributory negligence in getting off said car, and that her negligence contributed to the accident; yet, if you further believe from the evidence that the conductor, after he discovered the plaintiff's peril, by the exercise of proper care and caution could have avoided the mischief which happened, and failed to do so, the plaintiff's negligence, if any, will not excuse the defendant, and in such case the plaintiff is entitled to recover.[73]

(9) The actionable negligence charged in the plaintiff's petition is that the conductor of the defendant's car, upon which the plaintiff was a passenger, caused the car to stop on the south side of L. avenue for the purpose of permitting the plaintiff to alight therefrom, and that while the plaintiff was in the act of alighting the defendant carelessly, negligently and suddenly started said car whereby the plaintiff was thrown to the street and injured. The burden of proof as to the act of negligence charged as above rests upon the plaintiff throughout the case, and before you are warranted in returning a verdict in favor of the plaintiff, you must find by the preponderance or greater weight of the evidence that the plaintiff's injuries were caused by the act of negligence on the part of the defendant as above stated, and unless you so find your verdict must be for the defendant.[74]

(10) If the jury believe from the evidence that it was reasonably prudent, for the safety of the traveling public, that the defendant should stop or slow down its cars before reaching Ninth street and await the signal of the watchman, then it became the duty of the defendant to make such stop or slow down; and passengers riding on defendant's cars must take the responsibility of informing themselves of the methods so to be observed in operating defendant's road at that point; and plaintiff had no right to undertake to alight at that point, and if she did so, it was at her own risk and she cannot recover, unless the jury shall further

[72] Baltimore & O. R. Co. v. Leapley, 65 Md. 573, 4 Atl. 891.

[73] Richmond, P. & P. Co. v. Allen (Va.), 43 S. E. 356.

[74] Peck v. St. Louis Tr. Co. (Mo.), 77 S. W. 736.

find from the evidence that the car had come to a full stop, and that said car was started up again while plaintiff was alighting therefrom, with actual knowledge of the conductor that she was so alighting at the time.[75]

(11) Although you may believe that the plaintiff got off from the car at the north side of Division street, when the usual place for alighting was on the south side of Division street, that fact alone would not justify you in finding her guilty of such negligence as would bar a recovery in the case, unless you believe and find that it was the proximate cause of the injury.[76]

(12) The jury are instructed, as a matter of law, that if you believe from the evidence that the plaintiff got off the defendant's car at an improper place, or in an improper manner, and if you further believe that such action on the part of the plaintiff was a want of ordinary care which contributed to the injuries complained of, then your verdict must be for the defendant.[77]

(13) If you find from the evidence that the plaintiff's injuries, if any she has sustained, were caused by her leaving the defendant's car before it had stopped still and while it was in motion, and that but for such attempt on her part to alight from said car while it was in motion she would not have sustained any injury, then the plaintiff cannot recover and your verdict must be for the defendant.[78]

§ 563. **Passenger injured in leaving train.**—(1) It was the duty of the railroad company to use that high degree of care to avoid injury to the plaintiff, when she was about to alight from its train at M on the occasion in question, which very prudent, cautious and competent persons usually exercise under the same or similar circumstances as those then existing. It is a question of fact for the jury to determine whether the defendant's employés were guilty of the acts of which plaintiffs complain, and

[75] Jackson v. Grand Ave. R. Co. 118 Mo. 217, 24 S. W. 192.

[76] North C. St. R. Co. v. Eldridge, 151 Ill. 542, 546, 38 N. E. 246. Held proper to meet the argument of counsel that the plaintiff was guilty of negligence in getting off the car on the north, instead of the south side of the street.

[77] North C. St. R. Co. v. Eldridge, 151 Ill. 542, 548, 38 N. E. 246.

[78] Peck v. St. Louis Tr. Co. (Mo.), 77 S. W. 736.

whether such acts show that said employés failed to use the degree of care above defined or not.[79]

(2) If the jury believe from the evidence that the night on which the plaintiff was injured was intensely dark, and the vision of the plaintiff was further obstructed by a fierce snowstorm that was raging at the time, and that the defendant failed to light the station or stopping place at Q, and that in consequence of the defendant's failure to so light the station or stopping place at Q, the plaintiff, in attempting to alight from the defendant's train, fell and was injured, without fault on her part, then the jury must find for the plaintiff.[80]

(3) If the plaintiff in this case was accepted as a passenger on the defendant's train, and paid his fare, and in reaching the station of his destination, and upon attempting to get off the train he was thrown down and injured, and this was caused by the negligence or the failure of duty upon the part of the defendant, its agents or servants, he is then entitled to recover, unless by his own negligence or want of care he so contributed to the accident as to deprive him of any remedy.[81]

(4) The plaintiff had a right, after the name of the station was announced, to infer that the first stop of the train at the platform was at the station, and when the train came to a full stop, if the jury believe it did come to a full stop, opposite the platform of the station, and the conductor had stepped off his train with his lantern immediately preceding said stopping, if any, the plaintiff was warranted in believing the proper time had arrived for him to leave the train, unless the jury believe he was warned or directed not to alight then; and if the jury believe from the evidence that said train came to a full stop opposite the platform of this station, and the plaintiff, in the exercise of such care as a prudent person would have used, undertook to leave the train, and through the sudden starting of the same was jerked or thrown therefrom, or fell upon the platform, and between it and the cars, and was injured as charged in the petition, your finding and verdict must be for the plaintiff.[82]

[79] Houston & T. C. R. Co. v. Dotson, 15 Tex. Cv. App. 73, 38 S. W. 643.

[80] Alexandria & F. R. Co. v. Herndon, 87 Va. 197, 12 S. E. 289.

[81] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 575.

[82] Leslie v. Wabash, St. L. & P. R. Co. 88 Mo. 53.

(5) The plaintiff in this case claims that her dress was held in some way on the platform of the defendant's car, and that the conductor negligently started the car while it was so held. If her dress was held upon the platform or step by some object or force, that is a separate and independent fact, and if you find the evidence justifies you in finding such to be the fact, you may do so without determining how or by what it was held.[83]

(6) The plaintiff was not bound to apprehend any carelessness upon the part of the defendant. She had a right to rely upon the defendant having its platform in good condition, and free from obstacles of an unusual character upon which her dress might catch. She was not bound to apprehend that the conductor might start the car while her body was in contact with it, or until she was free from it and had reached a position of safety. She was not bound to apprehend that the defendant might do anything that would place her in jeopardy. On the contrary, she had a right to place full reliance on the defendant doing its full duty towards her, and exercising the high degree of care which the law requires of it.[84]

(7) The jury are instructed that this case is to be determined upon the facts in evidence, and not upon any theory advanced to explain circumstances; that is to say, that before the plaintiff shall be entitled to a verdict for any amount, the evidence must satisfy the minds of the jury that the defendant, its agents or employés had carelessly and negligently maintained or permitted some obstruction to be on or upon the platform or steps of said car whereby the dress of the lady in the act of leaving the car would be caught. The evidence must prove this fact; and, if it does not, and the defendant, its agents or employés not being otherwise negligent in the discharge of their duty, and the plaintiff herself, in leaving said car carelessly neglected, in the exercise of ordinary care, to handle or take care of her dress skirts, and such negligence or carelessness of the plaintiff was the proximate cause of her injury, she cannot recover, and your verdict should be for the defendant.[85]

[83] Patterson v. Inclined P. R. Co. 12 Ohio Cir. 280.

[84] Patterson v. Inclined P. R. Co. 12 Ohio Cir. 280.

[85] Patterson v. Inclined P. R. Co. 12 Ohio Cir. 280.

§ 564. **Duty of carrier to stop train.**—(1) It is the duty of a railroad company at each station where passengers get on and off the train at night to have the passway into and out of the cars so arranged and lighted as to enable passengers getting on and off, and using reasonable care and diligence, to do so with safety.[86]

(2) It was the duty of the defendant's employés to stop the train a sufficient and reasonable length of time to allow the plaintiff to get off the train, and whether or not the train did stop such a length of time you must decide from all the evidence before you.[87]

(3) And the train must be brought to a complete halt the length of time necessary, and not merely checked up in its speed.[88]

(4) If you believe from all the evidence in this case that the plaintiff became and was a passenger upon a car of the defendant, and that her fare had been paid to the conductor, and that the plaintiff gave to the conductor on such car reasonable notice of her desire to get off said car at the corner of Ninth and Reynolds streets, as alleged in her declaration, it then and there became and was the defendant's duty to stop said car at said place, upon arriving at the same, a sufficient length of time to enable the plaintiff to alight therefrom in safety; and if the jury further believe from all the evidence that the defendant thereafter ran its said car to the said corner of Ninth and Reynolds streets and was then and there in the act of slowing up or stopping said car, and that the plaintiff was then and there exercising all due care and caution for her own safety, and that while so exercising such care and caution she was preparing to alight from said car when it should come to a stop, and that such act or acts by her, of preparing to alight at the time, under all the circumstances and in the manner shown by the evidence, were not negligence or carelessness on her part, and that the defendant then and there did not stop the said car so that the plaintiff could safely alight therefrom, but suddenly started said car in such manner that it thereby then and there threw

[86] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 575.

[87] Gulf, C. & S. F. R. Co. v. Rowland, 90 Tex. 365, 38 S. W. 756.

[88] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 575.

the plaintiff to the ground, and that such starting of the car was negligence on the part of the defendant, and that the plantiff was thereby injured as charged in her declaration, and that the plaintiff was during all the time in the exercise of due care and caution for her own safety, then the defendant would be liable to the plaintiff for such injury, and in such case you will find for the plaintiff.[89]

§ 565. **Passenger entitled to reasonable time to get off.**—(1) A passenger is entitled to a reasonable time to leave the car in which he has been riding. When a train is stopped for that purpose, and when reasonable time is not in fact allowed to get off in safety (of which the jury are the judges), and in attempting to do so, without fault on his part, injuries result to him, he is entitled to recover for such injuries.[90]

(2) A reasonable time to get off, as mentioned in these instructions, is such time as it usually requires for passengers to get off and on the train at that station in safety.[91]

(3) If the jury find from the evidence that on the twenty-third day of June, 1902, the defendant was operating the car mentioned in the evidence for the purpose of carrying passengers for hire; and if the jury find from the evidence that on said day the plaintiff was, by the defendant's servants in charge of its car, received as a passenger thereon; that she paid her fare; that the car stopped at her destination to allow her to get off; that whilst she was in the act of getting off the defendant's servants in charge of said car caused or suffered it to start before she had reasonable time to get off, and that thereby the plaintiff was thrown from said car and injured; and if the jury believe from the evidence that the plaintiff was exercising ordinary care at the time, then she is entitled to recover.[92]

(4) If the jury believe from the evidence that the plaintiff was not afforded a reasonable time to alight on defendant's platform by the defendant or its employés, and before she had time to reach the platform safely the train was negligently started, and thereby caused the plaintiff to fall off said platform, and

[89] Springfield C. R. Co. v. Hoeffner, 175 Ill. 634, 51 N. E. 884.

[90] Little R. & Ft. S. R. Co. v. Atkins, 46 Ark. 430.

[91] Little R. & Ft. S. R. Co. v. Atkins, 46 Ark. 430.

[92] Hannon v. St. Louis Tr. Co. (Mo. App.), 77 S. W. 159.

by reason of said fall she has received injury, they will find for the plaintiff to the amount of the damages as may appear from the evidence to have been sustained by her.[93]

(5) It was the duty of defendant's servants and employés, on the occasion in question, to stop the train long enough for plaintiff, by the exercise of ordinary care and diligence, considering her age, sex and physical condition, to get off the train safely before it was started, or suffered to start; and if the jury believe, from the evidence, that the plaintiff, as soon as the train stopped, got up from her seat and walked at once, and as fast as she reasonably could, out on the platform and down the step on the car, without stopping on the way; that she did all the law required of her, so far as diligence on her part in getting off the train was concerned; and if, under such circumstances, the defendant's servants or employés started the train while she was proceeding to alight, still using due and reasonable haste in getting off the train, such starting of said train was an act of negligence on the part of defendant, and a breach of its duty to plaintiff as a passenger on its road.[94]

(6) If the defendant or its officers knew of any inability of the plaintiff to alight from the train in the usual time, it was bound to give her such reasonable time to get off and be clear of danger in getting off as the circumstances required, and if you find from the evidence that such were the facts, and that it did not afford the plaintiff a reasonable time to alight as aforesaid, you will find in her favor for all the injury and damage suffered by her that may be shown by the evidence.[95]

(7) If the jury believe from the evidence that the defendant company, through their agents, employés and servants, whilst the train of the company was at the depot, in the act of discharging passengers, negligently and violently started its train from a stand-still without notice or warning to its passengers, the defendant company is responsible for all injury resulting to a passenger from such act.[96]

[93] Georgia P. R. Co. v. West, 66 Miss. 312, 6 So. 207. See Gulf, C. & S. F. R. Co. v. Rowland, 90 Tex. 365, 38 S. W. 756.

[94] Hickman v. Missouri Pac. R. Co. 91 Mo. 435, 4 S. W. 127.

[95] Georgia P. R. Co. v. West, 66 Miss. 311, 6 So. 207.

[96] Southern R. Co. v. Smith, 95 Va. 189, 28 S. E. 173.

§ 566. **Platform unsafe—Passenger getting off.**—(1) If the jury believe from the evidence that at the time of the plaintiff's being injured there was no platform or other proper landing-place at the train's stopping-place at D, and that the defendant's servants did not assist the plaintiff to alight, and for want of such platform or landing-place and assistance in alighting the plaintiff was injured without fault on her part, then the jury must find for the plaintiff.[97]

(2) If a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe should be upon the platform at the time of the arrival of trains, and during the time the train remains at the station.[98]

(3) The defendant is bound to provide safe and sufficient platforms for the landing of passengers, of sufficient length to afford safe egress to passengers from an ordinary train.[99]

(4) It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable; but it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care. If a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe should be upon the platform, at the time of the arrival of trains and during the time the trains remain at the station.[100]

[97] Alexandria & F. R. Co. v. Herndon, 87 Va. 196, 12 S. E. 289.

[98] Quaife v. Chicago & N. W. R. Co. 48 Wis. 516, 4 N. W. 658.

[99] St. Louis, I. M. & S. R. Co. v. Cantrell, 37 Ark. 523.

[100] Quaife v. Chicago & N. W. R. Co. 48 Wis. 516, 4 N. W. 658.

§ 567. Injury to passenger approaching or getting on train. (1) If you believe from the evidence that the train had not come to a full stop, but that the stop during which the plaintiffs attempted to go on board was one which resulted from checking the speed of the train in bringing it up to the station, yet if the passengers were directed to go on board by the men in charge of the train, the plaintiffs had a right to assume that the train was ready for their reception, and cannot be charged with negligence in following that direction; provided the train, where they attempted to enter, was actually still at the time; and if the cars were not ready for the reception of passengers, it was a clear act of negligence in the company's servant to tell them to go on board.[101]

(2) When a railroad company receives passengers from a space between parallel tracks it is bound to provide such safeguards as will protect passengers in the exercise of ordinary care from injury from a passing train, and if it fails to do this, whether its negligence consists in its failure to provide proper platforms, or failure to notify passengers who have gone between its tracks to enter its cars on the approach of a train on a track parallel to that on which a passenger train is standing, and an injury results from said failure to one of its passengers who is about to enter its car without contributory negligence on the part of said passenger the company is liable therefor.[102]

(3) When the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, and suffers or directs passengers to enter at out of the way places, it is its duty to use the utmost care in preventing accidents to passengers while entering. And if you find in this case that the defendant's agents were negligent within the meaning of this instruction, and that the plaintiff was injured thereby, still the question remains whether or not the plaintiff on her part contributed by her own negligence to the injury, and if you find that she did so contribute, she cannot recover. If she did not contribute, she can recover.[103]

[101] Curtis v. Detroit & M. R. Co. 27 Wis. 160.

[102] Union Pac. R. Co. v. Sue, 25 Neb. 779, 41 N. W. 801.

[103] Allender v. C. R. I. & P. R. Co. 43 Iowa, 280.

(4) If the jury find from the evidence that it was necessary for the deceased in order to take the W accommodation train, then on the south track of the defendant's road at W, if the jury so find, to cross the north track of the defendant's road, and that said W train was engaged in receiving and discharging passengers, all of whom were compelled to cross said north track in going either to or from said train, and if the jury find from the evidence that passengers were passing and did pass across the said north track, then the deceased had the right to consider that these circumstances amounted to an implied invitation on the part of the defendant to the deceased to cross the said north track and to imply assurance that it would be safe for him to do so.[104]

(5) If the train, in being brought up to the station, came to a stop in such a manner as to induce the belief on the part of the passengers in waiting on the platform that it had stopped for the reception of passengers, and then, when the passengers acting on this belief were going aboard, started again without caution or signal given, that would constitute an act of negligence on the part of the defendants; and it would make no difference whether in so starting the train it was intended to proceed to the next station, or merely to locate it more conviently at the same station.[105]

(6) If the jury believe from the evidence that the plaintiff was at the time of the occurrence in question a passenger on one of the cars of the defendant's street railroad, exercising reasonable care and diligence, and that the car started, before plaintiff took his seat, with a sudden and violent jerk, that by reason thereof the plaintiff lost his balance, and his hand was thrown against and through one of the windows of the car, cutting and injuring it, then and in that case the defendant is liable to the plaintiff for the damage caused by and resulting from said injury to plaintiff, unless the jury further believe from the evidence that the defendant, its agents, servants and employés managing said car were not guilty of any negligence or want of care in the management of said car causing the injury; and the burden of show-

[104] Baltimore & O. R. Co. v. S. &c. 60 Md. 452.

[105] Curtis v. Detroit & M. R. Co. 27 Wis. 161.

ing such care and want of diligence is upon the defendant to prove to the satisfaction of the jury.[106]

(7) Although the jury may believe from the evidence that if the plaintiff had, on entering the car, taken hold of a strap, or taken a seat nearer the door than the one he attempted to take, the accident would not have happened, yet if the jury further believe from the evidence that he acted with reasonable and ordinary care in not taking hold of a strap or in moving further forward, and as a prudent man under similar circumstances would ordinarily act, then he was using all the care and diligence imposed by law upon him.[107]

(8) Even though the jury believe the defendant company was to blame in starting the car in which plaintiff was standing, with a violent and unusual jerk, and before plaintiff had an opportunity of taking his seat, yet if the jury also find that plaintiff was informed by the conductor striking the bell, or in any other way knew or had reason to expect the car was about to start, then it was the duty of the plaintiff to have protected himself by the most prudent means within his reach against the starting of the car. And if you find that straps were provided in said car for the use or convenience of passengers, by which the plaintiff, after the warning of the conductor's bell, might have supported himself while the car was being started, and that he failed so to do, and by reason of such failure he was injured, then you will find the issues for the defendant.[108]

(9) If the jury believe from the evidence that the plaintiff at the time of the injury in question went upon the defendant's car as a passenger, and there was a vacant seat, then and in that case it was the bounden duty of defendant, its servants and employés either to not start the car until he had time to get a seat, or if it started it before, to use the utmost care to start it smoothly and in such a manner as not to throw him off his feet. And if the jury believe from the evidence that the car was started before the plaintiff had reasonable time

[106] Dougherty v. Missouri R. R. Co. 97 Mo. 655, 8 S. W. 900.

[107] Dougherty v. Missouri R. Co. 97 Mo. 659, 8 S. W. 900.

[108] Dougherty v. Missouri R. R. Co. 97 Mo. 659, 8 S. W. 900.

to take his seat, and with a sudden and violent jerk which might have been avoided, causing said injury, the jury will find for the plaintiff, unless it appears from the evidence that said jerk was produced by some cause not under the control of defendant or its agents, servants or employees.[109]

(10) If the jury believe from the evidence in the case that the plaintiff, at the time of the alleged infliction of the injury sued for in this case, was carefully walking on the passenger platform of the defendant, prepared by it at Chapin for the use of passengers, and that so walking the plaintiff was using ordinary care, and did not, by his carelessness or want of care, contribute to the infliction of said alleged injury, and if they further find, from the evidence in the case, that the agents of the defendant were guilty of gross carelessness in unloading timber from a box car, and thereby carelessly and negligently struck the plaintiff with said timber, then the defendant is legally liable in this case, and the plaintiff is entitled to a verdict. And if the jury find for the plaintiff, they will take into consideration the nature and extent of the wound, the pain and suffering, if any, the loss of time and costs incurred in treating said wound, if any has been proven in the case, and from all the facts and circumstances in evidence in the case, give to the plaintiff such damages as will compensate him, in the opinion of the jury, for such injury, not to exceed the amount claimed in the plaintiff's declaration.[110]

(11) If the jury believe from the evidence that at the time of the alleged injury to the plaintiff said plaintiff was legally and rightfully upon the passenger platform of the defendant at Chapin, for the purpose of ascertaining the time of departure of a train, and while passing along on said platform the agents or servants of the defendant, without any notice or warning to passengers, threw out of a box car, on the said passenger platform, a large and heavy stick of timber on his forehead, and thereby knocked said plaintiff down and seriously injured him; and if they further find from the evidence that said plaintiff at that time was using ordinary care and did not cause the infliction of

[109] Dougherty v. Missouri R. R. Co. 97 Mo. 657, 8 S. W. 900.

[110] Toledo, W. & W. R. Co. v. Maine, 67 Ill. 299.

said alleged injury by his negligence, and that the agents of the defendant did not use reasonable care in discharging said timber, then the defendant is liable in this case for whatever injury resulted to the plaintiff from said alleged injury, not to exceed the sum claimed in the plaintiff's declaration.[111]

(12) If the jury believe from the evidence that it was the direct and usual way, in getting on or off defendant's trains on the south track to or from the junction sidewalk on the north, for passengers to cross over defendant's north track, and that defendant invited and allowed passengers to so cross over its north track, in getting on or off its trains on the south track at said junction to or from the sidewalk on the north, then they are instructed that the plaintiff's right as a passenger entitled him to the same degree of extraordinary care and vigilance for his safety, on the part of the defendant, while he was passing from his train over defendant's north track to the junction sidewalk on the north as while being transported as a passenger over defendant's line.[112]

(13) If H voluntarily took and placed himself in a dangerous and improper position on the car, when he might have taken a more safe place or position, and his death was caused by reason of his having placed himself in such a dangerous position, then the plaintiff cannot recover.[113]

§ 568. **Passenger negligent in getting on train.**—(1) If the conductor warned the passengers to keep away from the train, it was the plaintiff's duty to have heeded such warnings, and if she attempted to board the train before it had apparently reached its location at the platform, and when it was apparent that it had not reached said location, she was guilty of negligence, and cannot recover.[114]

§ 569. **Passenger falling off the platform—No liability.**—(1) If the jury believe from the evidence that the injury complained of by the plaintiff in this action was caused by a fall from the platform at B, to the ground, and not by reason of a fall in

111 Toledo, W. & W. R. Co. v. Maine, 67 Ill. 299.

112 Burbridge v. Kansas City Cable R. Co. 36 Mo. App. 678.

113 Huelsenkamp v. Citizens' R. Co. 37 Mo. 537.

114 Curtis v. Detroit & M. R. Co. 27 Wis. 162.

getting from the car on said platform, they will find for the defendant.[115]

(2) If the jury believe from the evidence that plaintiff got off of defendant's train at B, and was safely delivered on the platform at said station, where passengers on the road of defendant were accustomed to alight, and in turning round she stepped off the end of said platform, then an injury received from such a fall is without fault on the part of defendant, and they will find for defendant.[116]

(3) If the jury believe from the evidence that after plaintiff had safely gotten on the platform at B the train started, and that, owing to her age, debility or other cause, she was startled by the starting thereof, and in consequence made a false step and fell from the platform and was injured, the defendant was not responsible therefor, and they will find for the defendant.[117]

(4) If, on the other hand, you believe from the evidence that the conductor of said defendant railway company in charge of said train did not push and kick the plaintiff, causing him to fall from said train, or if you find from the evidence that some person other than said conductor of the defendant railway company in charge of said train pushed and kicked the plaintiff after the plaintiff had boarded said train, and thereby caused him to fall from said train, then in either of said events you will find for the defendant railway company.[118]

§ 570. **Passenger riding upon platform of car.**—(1) A passenger upon a railroad train, after said train has stopped at a regular station, has a right to go upon the platform of said coach in which said passenger may be, and within the time allowed by the rules of the company for the stopping of said train at said station, so that said passenger, being upon said platform, does not interfere with the proper management of said train or with passengers alighting therefrom or getting thereon, and that it is not per se negligence so to do, and that the mere fact of a passenger being upon the platform under such circumstances

[115] Georgia P. R. Co. v. West, 66 Miss. 313, 6 So. 207.

[116] Georgia P. R. Co. v. West, 66 Miss. 312, 6 So. 207.

[117] Georgia P. R. Co. v. West, 66 Miss. 313, 6 So. 207.

[118] Texas, &c. R. Co. v. Tems (Tex. Cv. App.), 77 S. W. 231.

does not constitute negligence upon the part of said passenger.[119]

(2) If the jury believe from the evidence that under the circumstances of the case there was a reasonable necessity, either real or apparent, for the plaintiff to travel on the platform of the car, and that he made such effort to obtain accommodations inside of the car as an ordinarily prudent man would have made under similar circumstances, then he was not guilty of negligence by reason of standing on the platform.[120]

(3) If you believe from the evidence that while the train was in motion the plaintiff, for his own convenience, left the inside of the car in which he had been riding and went upon the platform for the purpose of riding there or of passing into the next car in search of a seat, you are instructed that the plaintiff assumed all risk of falling or being thrown from the train by reason of the motion or oscillation thereof, whether caused by speed, curves, frogs or switches, and in that case you must find for the defendant.[121]

(4) If you find that at and prior to the time in question there existed an express rule or regulation of the defendant company that passengers should not stand upon the platform of the cars while the train was in motion, and that such rule or regulation was actually before that time brought to the plaintiff's knowledge by means of notices posted upon the doors of the defendant's cars, and if she went upon the platform of the moving train in violation of such express rule or regulation and attempted to step therefrom to the depot platform, she could not recover in this case; but if she was in the act of leaving the train at the time it started, then the standing upon said platform would not be a violation of such rule or regulation, although the train may have been in motion.[122]

§ 571. Assisting passenger—By carrier's agents.—(1) Whether it was the duty of the defendant's agent to have assisted the

[119] Southern R. Co. v. Smith, 95 Va. 189, 28 S. E. 173. See St. Louis, B. & S. Co. v. Hopkins, 100 Ill. App. 567.

[120] Highland Ave. & B. R. Co. v. Donovan, 94 Ala. 300, 10 So. 139. See Chesapeake & O. R. Co. v. Clowes, 93 Va. 196, 24 S. E. 833.

[121] Chesapeake & O. R. Co. v. Clowes, 93 Va. 195, 24 S. E. 833.

[122] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 147, 49 N. W. 1114.

plaintiff in getting on the car is a question for you to consider and determine from the evidence in the case; and for this purpose it is proper for you to consider the train and the car, their distance from the platform and depot, the facility with which access could be had, the sex, age and inexperience of the plaintiff, if these matters were known to the defendants' agents, and all the facts and circumstances surrounding the case.[123]

(2) A railroad company is not responsible for the willful trespass or unlawful acts of its agents, or for acts done clearly outside of the scope of their employment; but where a brakeman on a train undertakes to direct and assist passengers in getting on and off the cars, in the absence of proof to show that this was outside of the scope of his duties, there would be no presumption that such was the fact.[124]

(3) The defendant was under no obligation or duty to the plaintiff on account of her age or feeble condition, to assist her off the train, or to stop longer at the station than was usual, to enable her to get off unless she had notified the conductor or some employee on the train of her condition.[125]

§ 572. **Ticket not essential to become passenger.**—(1) To become a passenger, and entitled to protection as such, it is not necessary that a person shall have entered a train or paid his fare, but he is a passenger as soon as he comes within the control of the carrier at the station through any of the usual approaches, with the intent to become a passenger, and the court therefore further instructs the jury that if they believe from the evidence that the plaintiff, B, on the second day of July, 1888, went to the defendant's depot at the town of C by one of the usual routes thereto, for the purpose and with the intention of taking the next train, and stepped upon the platform of said depot with the intention and purpose of becoming such passenger, the plaintiff then became, in contemplation of law, a passenger of the defendant, provided she came to said depot and platform within a reasonable time before the time for the

[123] Allender v. C. R. I. & P. R. Co. 43 Iowa, 277.

[124] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 576.

[125] Little R. & Ft. S. R. Co. v. Atkins, 46 Ark. 432.

departure of said train, whether or not she had purchased a ticket from the defendant or its agent.[126]

(2) Although when the occurrence inquestion happened the plaintiff had not paid his fare, and by reason of said event got off without paying, yet if the jury believe from the evidence that he went on the car as a passenger with the intention of paying his fare when called upon, then he was a passenger, and the defendant owed to him the same duties as if, in fact, he had paid his fare.[127]

§ 573. **Mistake of conductor in taking ticket.**—(1) It is the duty of carriers of passengers to provide agents and servants who can and will properly protect the interests of the passengers, and not by want of skill, lack of knowledge, a want of care, take from passengers rights for which they have contracted and paid. A passenger has a right to act upon the conduct and directions of the agents of the company. If the conductor of a train of cars takes from a passenger a coupon of a ticket, which said ticket entitles him to passage from one station on said road to another and return, and by mistake or otherwise takes the coupon which entitles the passenger to return passage, when he should have taken the one entitling the passenger to passage going, this would be neglect of the company, and the pasenger would have a right to rely on the act of the conductor in taking one coupon of his ticket, and he would be entitled to use the other end of his coupon on his return passage.[128]

§ 574. **Putting off passenger for want of ticket or fare.**—(1) If you find from the evidence before you that the ticket in question was a third-class or emigrant ticket which had been sold at a reduced rate to a person in San Francisco other than the plaintiff, and that said ticket, by its terms, was not transferable, and the purchaser thereof in San Francisco, in part consideration of such sale at a reduced price, agreed that it should not be transferable, and you further find that the plaintiff purchased it in Omaha from some person other than the defendants

[126] Barker v. Ohio River R. Co. 57 W. Va. 430, 41 S. E. 148.

[127] Dougherty v. Missouri R. R. Co. 97 Mo. 658, 8 S. W. 900.

[128] Pennsylvania Co. v. Bray, 125 Ind. 232, 25 N. E. 439. Held correct when taken in connection with other instructions.

or their authorized agent, and offered and attempted to use it as entitling him to a passage from Omaha to Chicago on the defendant's road, and refused to pay his fare on the defendant's road and did not pay his fare, then the defendants were not under obligation to allow the plaintiff to ride upon said ticket, and upon refusal to pay fare had a right to require the plaintiff to leave the train, and he cannot recover damages based on the fact that he was so compelled to leave the train.[129]

(2) If the jury shall find from the evidence that the plaintiff on the first day of May, 1868, purchased at New York a through ticket from that place to B over the New Jersey railroad and the P. W. & B. R. railroad, and on that day proceeded on his journey as far as P on the last named road, where he left the train, and if the jury shall further find that after passing the then conductor of the train took up said through ticket and gave the plaintiff a check in lieu thereof, which has been introduced in evidence; and if the jury shall further find that the plaintiff on the sixth day of May got upon the defendant's train for B at H and the then conductor refused to take said check, but informed the plaintiff that he must pay his fare to B or he would be obliged to stop the cars and put him off, and that the defendant refused to pay said fare, and the plaintiff was then put off, then the plaintiff is not entitled to recover in this case, provided the jury shall find that no more force than was necessary was used in putting the plaintiff off the train, even if the jury shall further find that on arriving at P. on the train on the said first day of May, the plaintiff inquired from a man at the window of the ticket office of the defendant at that place whether said check would be good to take him to B another day, and was told by said man that it would.[130]

(3) Railroad companies have the right to demand and receive legal rates of fare from persons traveling on their trains; and, in the event of the refusal of a passenger to pay his fare or show a ticket, conductors of a train have a right to eject such a passenger from the train, without using any more force or violence than may be necessary to overcome any unlawful re-

[129] Post v. Chicago & N. W. R. Co. 14 Neb. 112, 15 N. W. 225.

[130] McClure v. Philadelphia, W. & B. R. Co. 34 Md. 534.

sistance which such passenger may offer. It is the duty of the conductor to bring the train to a full stop before compelling the party to be ejected to step from the train, and exercise such ordinary care in ejecting him as an ordinarily prudent man would exercise under similar circumstances as connected with this case. In this state it is not necessary that the train should be at a station in order to justify the ejection of a person refusing to pay fare, but a conductor has the right to eject such a person between stations at points where the situation of the ground is such as not to expose the person ejected to special risks of danger.[131]

(4) If the jury believe from the evidence that K, the plaintiff, took a seat on the train from M to R on the twenty-fourth day of January, 1887, and refused to pay the usual fare or to furnish the conductor the usual ticket entitling him to a seat from M to R, but claiming a seat by virtue of a special contract with the defendant company, which he failed to exhibit to the conductor, and was in consequence thereof expelled from the train by the conductor, using no unnecessary force to put him off, then they must find for the defendant.[132]

§ 575. **Putting off disorderly person.**—(1) If you believe from the evidence that the plaintiff on the eleventh day of November, 1901, while a passenger on one of the defendant's cars near M. street used violent, boisterous and profane language, or was guilty of disorderly conduct, in the presence of other passengers, who were then and there on said car, then it became and was the duty of the defendant's conductor to remove the plaintiff from the car, and use such force as was necessary for that purpose.[133]

(2) It was the duty of the plaintiff to behave in a quiet and orderly manner while a passenger on the train of the defendant, and that it was the duty of the conductor to sustain order on said train, and if the plaintiff was acting in a disorderly manner on said train, the conductor could eject him from said train;

[131] Brown v. Chicago, R. I. & P. R. Co. 51 Iowa, 235, 1 N. W. 487.

[132] Knopf v. Richmond, F. & P. R. Co. 85 Va. 773, 8 S. E. 787.

[133] Ickenroth v. St. Louis Tr. Co. (Mo. App.), 77 S. W. 163.

and if the jury find that the plaintiff, while a passenger on said train, was acting in a disorderly manner and was threatened with expulsion from said train by the conductor, and that on account of the companionship of the plaintiff with other persons, who were also disorderly and riotous, the conductor could not properly make the attempt to expel the plaintiff from the train, as the plaintiff and his companions stated that they would resist any attempt to expel them from the train, that then the conductor was justified in requesting the first police officer whom he could find to arrest the plaintiff; and if the jury find that the police officer at the W depot was the first police officer the conductor saw, and that the conductor used due diligence in procuring a police officer, and that the conductor directed the police officer to arrest the plaintiff for said disorderly conduct, that the defendant is not liable for this arrest, and the verdict of the jury must be for the defendant.[134]

§ 576. **Passenger on wrong train.**—(1) The proof shows that the railroad company runs two daily trains between points named in plaintiff's ticket, and the regulation that one of these trains shall not stop at all stations is a reasonable regulation and one they had a right to make. A passenger who travels on said road with notice of such regulation cannot get on a through train and demand to be carried to a point at which said through train does not stop, even if he has a ticket to such point, unless he goes on the train by direction of the railroad company's agents. If the person who acted as agent, and sold tickets, directed the plaintiff to get on the through train, he had a right to get on said train and travel upon it; but if, after getting on, he was at a regular station notified that the train would not stop at E, it was his duty then to get off and take the proper train, for if the railroad agent at J, his point of departure, made a mistake, the railroad had a right to correct the mistake at any regular stopping station for that train. If, then, he was informed at P of the mistake, it was his duty to get off, and if he did not do so, the conductor had a right to put him off in a proper manner.[135]

[134] Baltimore & O. R. Co. v. Cain, 81 Md. 87, 31 Atl. 801.

[135] I. & G. N. R. Co. v. Hassell, 62 Tex. 258.

§ 577. Passenger may rely on directions of carrier's agents. (1) A passenger is warranted in obeying the directions of the servants and agents of the carrier, when given within the scope of their duty, unless such obedience leads to a known peril which a prudent person would not encounter.[136]

(2) It is the duty of a passenger on a car to follow the reasonable instructions of those in charge of the car in regard to moving from one part of the car to another, unless it is apparent to the passenger that the moving would be attended with danger; and a passenger may rightfully assume that the servants in charge of the car are familiar with the operations of the car, and that they have a reasonable knowledge of what is safe and prudent for the passengers in giving such instructions. Therefore, if you find from the evidence that one of the servants of the defendant directed the plaintiff to move to that part of the car where the accident occurred, it was the duty of the plaintiff so to do, unless it was known and apparent to her that it would be unsafe for her to do so. And in the absence of apparent danger, she had a right to assume that it was safe for her to move to and stand at the place where the defendant's servant directed her to move to in the car. And if you find from the evidence that it was an unsafe place for the plaintiff to stand, and that without her fault she was injured by reason of her moving to and standing at such place, then your verdict should be for the plaintiff.[137]

(3) It is the duty of a passenger to follow the reasonable directions given by the agent in charge of the railway train in respect to passing from one car to another while the same is in motion for the purpose of finding a seat, but if the passenger himself knows that the movement would be attended with danger, it would not in such case be his duty to obey the conductor.[138]

(4) If the jury believe from a fair preponderance of the evidence that the plaintiff obeyed the defendant's conductor in charge of the train upon which she was a passenger, in getting off the train, and if she was not then apprised of

[136] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 561, 14 N. E. 572.

[137] Prothero v. Citizens' St. R. Co. 134 Ind. 440, 33 N. E. 765.

[138] Louisville & N. A. R. Co. v. Kelly, 92 Ind. 374.

any peril that she would encounter thereby, she would not be guilty of contributing to any injury received by her in thus alighting from the train.[139]

§ 578. **Passenger injured while changing cars.**—(1) If the jury find from the evidence that on the fourth day of June, 1880, H was a passenger on the cars of the defendant with a ticket entitling him to a ride from H to F; that he took the train at H and rode thereon to W, where it became necessary for him to change cars; and if they find from the evidence that in alighting from the train on which he was and passing over certain tracks of the defendant's road to take the train on which he was to continue his journey he was killed by the locomotive and cars of a freight train of the defendant, operated by the defendant's agent on its road, and if they find from the evidence that the killing of H resulted directly from the want of the exercise of ordinary care and prudence upon the part of the agents of the defendant, and not from the want of ordinary care and prudence of the deceased contributing to the accident, then the plaintiffs are entitled to recover.[140]

§ 579. **Liability when car owned by another.**—(1) If the jury find from the evidence that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation, and if they further find from the evidence that the car composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car without any fault of his own and by reason either of the defective construction of the car, or by some negligence on the part of those having charge of the car, then the defendant is liable.[141]

(2) In this case it is immaterial whether the defendant actually owned the cars or the engine forming the train on which the plaintiff was a passenger at the time of the alleged injury testified about or not, but if the jury believe, from all the evidence in the

[139] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 561, 14 N. E. 572.

[140] Baltimore & O. R. Co. v. S. 60 Md. 455.

[141] Pennsylvania Co. v. Roy, 102 U. S. 455.

case, that the plaintiff had purchased a ticket for her conveyance as a passenger over the railroad of the defendant, and had been received by the defendant in a car run and operated by the said defendant, for the purpose of carrying her as a passenger, and that while so a passenger on a car run and operated by the defendant, by the carelessness and negligence of the defendant, and without any fault or negligence on her part, the plaintiff was injured in manner and form as alleged in the declaration in the case or some count thereof, then the jury should find the defendant guilty, and assess the plaintiff's damages at such amount as, from all the facts and circumstances in evidence, they believe she has sustained, not exceeding ten thousand dollars.[142]

§ 580. Liability for injury from boiler explosion.—If the jury believe from the evidence that the defendants were negligent in the transportation of passengers from S to P and from P to S before and during the month of August, 1866, that during the same period of time W & Co. employed the plaintiff to carry their express matter between said place and paid the defendants to transport the same for a certain sum of money per month, and that the plaintiff and said defendant entered upon said arrangements and were engaged in the same during said period of time, and that it was understood and agreed between the defendants and W & Co. that the plaintiff, as their messenger, should be transported with their said express matter from S to P and from P to S during said period of time, and that the defendants made such transportation by cars propelled by steam and a steamer, and that said cars started from the town of P; that while thus engaged, the plaintiff during said period of time came to said cars, at the depot of the defendants, for the purpose of going to S; that he was standing on the platform of the defendants near said cars for the purpose of stepping into a car of the defendants (and that said platform was usually used by passengers departing or arriving by said cars) when the boiler of the locomotive attached to said cars exploded through the negligence or carelessness

[142] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 226. Held not assuming that the plaintiff was a passenger.

of the engineer employed by the defendants, who was then in charge of said locomotive, and the plaintiff was injured thereby (the plaintiff not being guilty of any negligence contributing to his injury), then the plaintiff is entitled to recover for such injury.[143]

§ 581. **Injury from accident—No liability.**—(1) If the jury believe from the evidence that the injury to plaintiff in this suit happened to her by mere accident, without any fault on the part of defendant or its employees, then the plaintiff cannot recover in this action, and they will find for the defendant.[144]

(2) A railroad company, in the conduct and management of its trains, is required to employ skillful and competent agents, and to use such means and foresight in providing for the safety of passengers, as persons of the greatest care and prudence usually exercise in similar cases; and should an injury result to a passenger from a failure to use such a degree of care and prudence, the company will be responsible for such injury, unless it appears that the passenger so injured, by the use of ordinary care and prudence (that is, the ordinary care and prudence usually exercised by persons of ordinary caution in his condition and circumstances), could have avoided the injury. But a railroad company is not responsible for an injury to a passenger which is the result of a mere accident or casualty, where there is no want of care or skill on the part of the company or its agents.[145]

(3) If the jury believe from the evidence that the defendant's train of cars in which plaintiff was being carried as a passenger on the morning of the twenty-seventh day of December, 1872, was thrown from the track, causing the injury to plaintiff in the petition complained of, wholly because of a fresh and contemporaneous break in an iron rail or piece of an iron rail of defendant's track, and under the train on which plaintiff was a passenger, and that such fresh break was caused wholly by

[143] Yeomans v. C. S. N. Co. 44 Cal. 81. (As to the carrier's power to contract against such liability to an express messenger, see Louisville, &c. R. Co. v. Keefer, 146 Ind. 21, 44 N. E. 796; Russell v. Pittsburgh, &c. R. Co. 157 Ind. 305, 61 N. E. 678.)

[144] Georgia P. R. Co. v. West, 66 Miss. 316, 6 So. 207.

[145] Houston & T. C. R. Co. v. Gorbett, 49 Tex. 576.

frost or extreme cold, and that such cause was one which the highest degree of practicable care, skill and caution consistent with operating the road at all could not have provided against, and that said train was not thrown from the track because of the mode of construction and repair of said track, and not because of any fault or neglect whatever of defendant, its agents or servants, then the jury should find for defendant as to the injuries to the person of plaintiff in the petition complained of.[146]

§ 582. **Passenger guilty of contributory negligence.**—(1) Notwithstanding the jury may find that the plaintiff was guilty of negligence, and that such negligence contributed to the injury of which she complains, yet still, if the agents of the defendant were aware of such negligence in time, by the use of ordinary care and prudence, to have avoided the effect of such negligence on her part, but did not do so, then such negligence on her part is not such contributory negligence as to constitute a defense to this action.[147]

(2) Even though the jury may believe from the evidence that the plaintiff received the injuries complained of by reason of his jumping from the defendant's car at the time of the wreck, yet if the jury further believe from the evidence that the plaintiff was so stunned and bewildered by the shock of the collision as to render said plaintiff unconscious of what he was doing, then the jury are instructed that said jumping was not such negligence as to prevent plaintiff from recovering damages, any more than if he had received said injuries complained of while in defendant's car, although the jury may further believe from the evidence that no injury would have been received by him if he had remained in the car.[148]

(3) If the jury should believe from the evidence that the plaintiff jumped from the defendant's car at the time of the wreck, yet if they further believe from the evidence that said plaintiff did so under a well-grounded fear of danger to his life or limbs, the plaintiff is as much entitled to recover in this action, so far as his jumping is concerned, as if he had received

[146] Louisville & N. R. Co. v. Fox, 11 Bush (Ky.) 506.

[147] Philadelphia, W. & B. R. Co. v. Hogeland, 60 Md. 150.

[148] Baltimore & O. R. Co. v. McKenzie, 81 Va. 78. See, Galena, &c. Co. v. Fay, 16 Ill. 558.

the injuries complained of while in defendant's car, although they may further believe from the evidence that if he had remained in the car he would not have been injured.[149]

(4) If you believe from the evidence that the plaintiff, in alighting from the train, failed to exercise the ordinary care and caution which a prudent man would usually exercise under like circumstances, and that such neglect on the part of the plaintiff contributed proximately to the injury suffered by him, then the plaintiff is guilty of contributory negligence and he cannot recover in this suit.[150]

(5) Should you find that plaintiff did not have a sufficient time to alight from the said train as above explained, but that she was guilty of gross or criminal negligence in alighting while the train was in motion, you will find for the defendant.[151]

(6) If the jury believe from the evidence that the train of cars upon which the plaintiff had taken passage had stopped a sufficient time for the plaintiff to have left them upon the platform where passengers leaving the defendant's cars usually land, and had again started on their course and had passed the platform provided by the defendant for passengers to get out of the cars upon, and that the plaintiff then left the platform of the car rather than be carried by, he was guilty of carelessness, and cannot recover in this action.[152]

(7) It was the duty of the plaintiff to use ordinary care as hereinbefore defined, as to her own protection in alighting from defendant's car, and if she was guilty of negligence contributing to the injuries of which she complains, then she cannot recover. That is to say, if the defendant, by its servants, was guilty of negligence, and the plaintiff was also guilty of negligence, contributing to her injuries, then the plaintiff cannot recover in this action.[153]

(8) It was the duty of the plaintiff in seeking to alight from the cars of the defendant company, to wait until such cars came to a full stop, or were moving so slowly that, under all the circum-

[149] Baltimore & O. R. Co. v. McKenzie, 81 Va. 78.

[150] International & G. N. R. Co. v. Eckford, 71 Tex. 276, 8 S. W. 679.

[151] Omaha & R. V. R. Co. v. Chollette, 33 Neb. 146, 49 N. W. 1114.

[152] Davis v. Chicago & N. W. R. Co. 18 Wis. 188.

[153] Denver Tramway Co. v. Owens, 20 Colo. 112, 36 Pac. 848.

stances, including the time of night, her sex and condition, it was safe for her to step off; and if she sought to alight from the car before such time, although unless she did so she might be carried beyond the point where she desired to get off, she was negligent and cannot recover in this case.[154]

(9) The facts of this case are for you to determine. The value of the testimony is for you. If the plaintiff without any fault of his own was injured by the fault of the defendant's motorman as charged, then he can recover, and if he can recover, he can recover according to the measure of damages I have given you. If, however, he in the smallest degree himself contributed to the injury, he cannot recover. Moreover, he cannot recover, if, however innocent the plaintiff was, the motorman did nothing wrong. If the motorman did his duty simply, and in consequence of some other set of circumstances not known to us the accident happened, then the plaintiff cannot recover. It requires negligence in the defendant and freedom from negligence in the plaintiff, both, to entitle the plaintiff to recover.[155]

§ 583. **Burden of proof generally.**—(1) The proof must show affirmatively that the plaintiff was a passenger upon the road of the defendant, and as such passenger was injured by the acts and negligence of the defendant and its employés; the proof must also show that the plaintiff was induced to believe from the acts or words of the employés of the defendant, that it was intended the plaintiff should alight from the train at the time and place when and where he had alighted from said train of cars.[156]

(2) It is not sufficient in this case for the plaintiff to prove the injuries alone, but it devolves upon her to show negligence on the part of the defendant, and that unless they believe from the evidence that defendant, its servants or employés, were negligent in delivering the plaintiff at B, they will find for defendant.[157]

(3) Although the burden of proving that the plaintiff contributed to the injury complained of is upon the defendant, yet if the

[154] Denver Tramway Co. v. Owens, 20 Colo. 112, 36 Pac. 848.

[155] Fitzpatrick v. Union Tr. Co. 206 Pa. St. 335, 55 Atl. 1050.

[156] International & G. N. R. Co. v. Eckford, 71 Tex. 275, 8 S. W. 679.

[157] Georgia P. R. Co. v. West, 66 Miss. 313, 6 So. 207.

jury shall believe from all the evidence in the case, whether such evidence was introduced by plaintiff or defendant, that there is a preponderance of evidence that the plaintiff was guilty of any negligence which contributed directly to producing the injury complained of, then the burden of proof is satisfied and the verdict of the jury must be for the defendant.[158]

§ 584. Carrier not an insurer of passenger's safety.—(1) The duty of a carrier is to safely carry passengers. It is true that a carrier of passengers is not an insurer of the safety of those whom it undertakes to carry against all the risks of travel, but, nevertheless, there rests upon such carrier this general duty of safely carrying.[159]

(2) Railroad companies are not insurers of their passengers and are not liable for injuries which such passengers may receive while being carried, unless the carrier is guilty of negligence which was the proximate cause of the injury received, and the passenger was free from negligence which may have contributed proximately to the injury of which he complains.[160]

(3) The defendant is not an insurer of the safety of its passengers, and if the jury shall believe from the evidence that the defendant had provided reasonable facilities for the transportation of such passengers as might reasonably be expected to apply to be carried from Old Point on the occasion in question, and that the cars are such as are in general use and in good order and condition; that the track, switches and frog at the point where the plaintiff was injured were in proper order and condition, and that the employés in charge of the train were experienced and competent men, and that the train in question was carried safely from Old Point to R, no negligence can be imputed to the defendant.[161]

§ 585. Carrier liable for loss or injury to baggage.—(1) A railroad company may become liable as a common carrier by contract for transportation of passengers and baggage over other

[158] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 522, 20 A. 2.

[159] Louisville, N. A. & C. R. Co. v. Wood, 113 Ind. 561, 14 N. E. 572.

[160] Houston & T. C. R. Co. v. Dotson, 15 Tex. Cv. App. 73, 38 S. W. 643.

[161] Chesapeake & O. R. Co. v. Clowes, 93 Va. 194, 24 S. E. 833.

railroads forming with its own a continuous line; and, where it does so contract, its liability is the same for losses occasioned by its negligence while the baggage is upon such other road as when it is upon its own road.[162]

(2) When a railroad company takes baggage for a passenger its liability is of the highest sort. It agrees to carry the baggage safely, and insures against all sorts of risks, except the act of God or the public enemy. But when the baggage is landed it is the duty of the owner to call immediately, or as soon as the throng and hurry incident to the arrival and departure of trains has subsided, and get his property. But if he fails to thus call and the agent of the company takes charge of it, then the responsibility will be changed. It will be the responsibility of a warehouseman instead of that of a common carrier. The liability will be to take such care of the property as an ordinarily prudent man would of his own property under like circumstances. All the defendant is required to do is to take ordinary care under the circumstances, such as men usually exercise in their own concerns. The defendant is not liable for the theft of the property, unless it is the result of the want of proper care.[163]

(3) In the absence of a special contract limiting the liability of the defendant, if you find from the evidence that it is liable for loss of the plaintiff's baggage, you will assess as damages the value of the trunk and such of its contents as you find were the wearing apparel of herself or her child, or their necessary or usual appendages or accompaniments of herself and child as travelers, with interest from the time of demand to the first day of the present term of this court.[164]

(4) The burden of proving any qualification of the liability of the defendant as a carrier rests upon it. The notice to be of any force must amount to actual notice. At all events, to exonerate the defendant as a carrier from its general liability, it must be shown at least by the evidence that the plaintiff, or others acting for her, assented to the demands of the notice, or with a knowledge of it acquiesced in it by making no remonstrance.[165]

[162] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 653.

[163] Pennsylvania Co. v. Miller, 35 Ohio St. 543.

[164] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 647.

[165] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 655.

§ 586. **Carrier's liability for baggage limited.**—(1) A carrier may restrict or limit the amount of its liability by a special contract accepted on the part of the owner of the baggage; and this may be done by notice brought to the knowledge of the owner of the baggage before or at the delivery to the carrier, if assented to by the owner.[166]

(2) And in determining whether or not the conditions and limitations were brought to the notice of the plaintiff and those acting for her, you will look to all the evidence in the case; as to the manner of the delivery of the ticket and the check, whether any thing was said or done calling attention to them or not; whether they were or were not read at the time of or before the receipt.[167]

§ 587. **Goods lost or delayed by carrier—Liability.**—(1) If the defendant was guilty of any unreasonable delay in the delivery of the turkeys, and it was the result of its own negligence or want of care and diligence in that behalf, then it is liable for whatever damages the plaintiff has sustained, if any. The defendant being a common carrier, it cannot, by its bill of lading given for shippers, or in any other way, exempt itself from liability for loss or damage arising from failing to deliver the goods shipped within a reasonable time, or at the time stipulated by it for delivery, if there is any such time, if the failure be the result of its own negligence or that of its agent or servant.[168]

(2) No conditions in a bill of lading can bind the shipper, unless where it is averred and proven by the carrier that the shipper knew of such conditions, and assented to them at or prior to the time of shipment, and such assent must be proven by the carrier. The law will not presume such assent. And whether there was a bill of lading for the turkeys and the plaintiff knew of and assented to the conditions, is a question for your determination, and the burden is on the defendant to prove these facts.[169]

(3) If you believe from the evidence that the defendant was a common carrier, and as such carrier received the money in question, to be carried and delivered to the plaintiff at Kankakee, and that the defendant delivered said money to one Edmunds

[166] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 655.

[167] Baltimore & O. R. Co. v. Campbell, 36 Ohio St. 655.

[168] American Ex. Co. v. Hawk, 51 Ohio St. 572.

[169] American Ex. Co. v. Hawk, 51 Ohio St. 572. See, Illinois, &c. R. Co. v. Cobb, &c. Co. 72 Ill. 148, 154, bill of lading prima facie evidence.

on a writing purporting to be an order of the plaintiff, and that said order was a forgery, then the defendant was guilty of gross negligence, and the plaintiff is entitled to recover the amount of said money.[170]

§ 588. **Carrier not liable for damage to goods.**—(1) If the jury believe from the evidence that the defendant held the leather for shipment by its usual and customary route for shipping freight to P, and that such arrangement for shipment was reasonably prudent, and if the jury believe from the evidence that the defendant exercised reasonable care and diligence in keeping it for shipment, then the plaintiff is not entitled to recover, and the jury must find for the defendant.[171]

(2) If the jury believe from the evidence that the plaintiff, at the time of delivering the package in question to the defendant's agent received a receipt for said package wherein it was expressly stipulated that the defendant would not be responsible for the same beyond the station of the defendant nearest to M, and the plaintiff's attention was called to or he knew of such underwritten limitation at the time, and that when it reached that point the defendant was to deliver the package to others, and that S was the nearest point on the route of the defendant to M, and that the defendant carried said package safely and in good order to S, and there delivered it to the United States Express Company in good order to complete the transportation, then the defendant was not liable any further, and the issues must be found for the defendant.[172]

(3) If you believe from the evidence that if the plaintiff sustained any damages by any of the trees becoming wholly worthless before they arrived and were tendered to the plaintiff at A, if in fact they were so tendered, and while they were being transported to that place, or by any of said trees being partially damaged by reason of delay in transportation while in the defendant's hands, then you will estimate such damages as the evidence shows the plaintiff to have sustained, if any, and return a verdict for such amount; but if you believe from the evidence

[170] American M. U. Ex. Co. v. Milk, 73 Ill. 224, 226.

[171] Louisville & N. R. Co. v. Gidley, 119 Ala. 525, 24 So. 753.

[172] Snider v. Adams Ex. Co. 63 Mo. 376.

that only a portion of said trees were damaged, and that within a reasonable time after the trees arrived at A they were tendered to the plaintiff, then it was the duty of the plaintiff to accept said trees, and if you believe that such tender was made to the plaintiff, then he can only recover damages for such trees as are shown to have been totally worthless, and damages for such other trees as were damaged at the time, if any were damaged.[173]

(4) If you believe from the evidence in this case that the trees in question were tendered to plaintiff after their arrival at A, and that if plaintiff had received them he could have preserved them, or any part of them, by the use of proper care and attention, it was his duty to have done so, and if he suffered loss on account of such failure to preserve said trees, he cannot recover for such loss.[174]

(5) In order to hold the defendant liable for the special damages claimed, that is, the price which different persons had contracted to pay for the said trees on delivery at Alba, sought to be recovered in this case, the facts of the sale of said trees by the plaintiff should have been brought to the attention of the defendant company at the time the trees were delivered to it for shipment, and unless you find that the defendant was so notified, or knew at the time the trees came into its hands of the special circumstances which would make a quicker delivery necessary, you should not allow the plaintiff the special damages claimed by him, unless from the nature and character of the freight, the defendant was charged with knowing that a quicker and speedy delivery thereof was important and necessary.[175]

§ 589. **Liability in shipment of live stock.**—(1) If the jury believe from the evidence that the defendant received from the plaintiff, on December second, 1871, his cattle and hogs for transportation to and delivery at Buffalo, New York, and that at the time of the receipt of the stock the road of the defendant, and its connecting lines running to Buffalo, were so crowded with freight

[173] St. Louis S. W. R. Co. v. Cates, 15 Tex. Cv. App. 135, 38 S. W. 649.

[174] St. Louis S. W. R. Co. v. Cates, 15 Tex. Cv. App. 135, 38 S. W. 648.

[175] St. Louis S. W. R. Co. v. Cates, 15 Tex. Cv. App. 135, 38 S. W. 649.

that they were unable to furnish cars within the usual time for the transportation of the plaintiff's stock, then such crowded condition of said road or roads would furnish no excuse for the defendant if the plaintiff's stock were not delivered at Buffalo, New York, in a reasonable time, if the jury believe the defendant was so bound to deliver.[176]

(2) A railroad company engaged in the business of transporting live stock assumes all the responsibilities of a common carrier. In the absence of any special contract limiting its liability it insures against all loss except that caused by the act of God or the public enemy. It may limit its liability by a special contract with the shipper or consignor of the property, but such special contract can never relieve the railroad company from liability for its own negligence.[177]

(3) If the jury believe from the evidence that the plaintiffs in this case entered into a written contract with the defendant to transport said stock in question (which was consigned to Media, Lancaster and Philadelphia, Pa.) to the terminus of its road, and there to deliver it to the connecting carrier, and that it was agreed between plaintiffs and said defendant in said contract that in case of loss and damage whereby any legal liability or responsibility should or might be incurred by the terms of said contract, that that company alone should be held responsible therefor in whose actual custody the live stock might be at the happening of such loss or damage, and if the jury further believe from the evidence that the northern terminal of the defendant's railroad is in H, Maryland, and that it safely and in a reasonable time delivered the said stock there to the C V railroad, and that the damage, if any, occurred after it had been so delivered to the connecting carrier, then they will find for the defendant, unless they believe from the evidence that the plaintiffs or their agents did, within a reasonable time after said delay or damage, if any, make demand upon the said defendant for satisfactory proof that said delay or damage did not occur while the said stock was in its possession.[178]

[176] Toledo, W. & W. R. Co. v. Lockhart, 71 Ill. 630.

[177] Kansas City R. Co. v. Simpson, 30 Kas. 647, 2 Pac. 821.

[178] Norfolk & W. R. Co. v. Reeves, 97 Va. 291, 33 S. E. 606.

§ 590. **Freight rate of carrier under federal statute.**—If the jury find from the evidence that the defendant company filed with the interstate commerce commission its tariff rates on hay and that said tariff rates so filed covered the tariff rate on hay from the station of Cale, in Indian Territory, to the city of St. Louis, and that said tariff rate on hay was printed and publicly posted at said station of Cale for the information and inspection of the public, and that in accordance with such tariff rate so filed with the said interstate commerce commission, and so printed and posted, the rate on hay was fixed and established at twenty-five cents per hundred with a minimum weight of twenty thousand pounds per car, and that such tariff rate was on file with the said interstate commerce commission at the time the hay in controversy was shipped, and that there had been no reduction in said tariff rate for a period of three days before the shipment of the hay in controversy was made, and if the jury further find that the defendant company only collected from the plaintiff an amount of money not exceeding the rate of twenty-five cents per hundred, with a minimum of twenty thousand pounds per car, then the jury must find for the defendant.[179]

[179] Missouri, K. & T. R. Co. v. Bowles, 1 Indian Ter. 250, 40 S. W. 901.

CHAPTER XLI.

NEGLIGENCE OF CITIES AND TOWNS.

Sec.
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§ 591. Sidewalks—Duty of city to keep them in repair.—(1) It was the duty of the defendant to use reasonable diligence to keep the sidewalk in question in a reasonably safe condition, and if the jury believe from the evidence that the defendant failed to perform such duty, and that by reason of its negligence in that regard the said sidewalk was permitted to remain out of repair and in a dangerous condition, by reason whereof the plaintiff, while exercising reasonable care on her part, received the injury complained of, then the defendant is liable. And the court further instructs the jury that if they find from the evidence that the plaintiff was herself guilty of some negligence, but that

the defendant was guilty of gross negligence contributing to such injury, and that the plaintiff's negligence was slight as compared with the negligence of the defendant, still she may be entitled to recover.[1]

(2) If the jury believe from the evidence that the most direct route for the plaintiff in going to and from his home to his place of business was over South River street in said city of Aurora, then the fact, if shown by the evidence, that the sidewalk on said street over which the plaintiff passed was defective, and had been in a defective condition for some years previous to the alleged injury, would not oblige him to take another sidewalk less convenient.[2]

(3) The law does not impose upon the city of Indianapolis the duty of keeping its gas lights lighted during all hours of the night, nor is the city liable for injuries which a person may receive while going over or along its streets, even though such injuries may have been caused by the failure of the city to have its lamps lighted, if this is the only act of omission proved against the city. But if there is a defect in a sidewalk or gutter-crossing liable to be dangerous to traveler's passing along or over the same in the nighttime, though using ordinary care, then it is the duty of the city to guard the same in some way, and if there are no lights then barriers or some other precautions must be used. You have a right, therefore, to consider the circumstance of the absence of lights in the vicinity of the gutter-crossing in question at the time of the alleged accident, if it is a fact that there were no lights in connection with the other facts and circumstances proved, both as bearing upon the question whether or not the defendant was guilty of negligence, as well as in determining whether or not the plaintiff herself was free from negligence.[3]

(4) If the jury find from the evidence that the injury com-

[1] City of Chicago v. Stearns, 105 Ill. 554. This instruction is not objectionable as being in conflict with the rule that the city shall have actual or constructive notice of the defective sidewalk before it can be held liable.

The doctrine of comparative negligence is no longer the law in Illinois. If the plaintiff by his negligence contributed to his injury he cannot recover.

[2] City of Aurora v. Hillman, 90 Ill. 68.

[3] City of Indianapolis v Scott, 72 Ind. 200.

plained of was suffered, and that it was occasioned by a fall upon the sidewalk, as charged in the petition of the plaintiff, and that the sidewalk at the place where the fall occurred was in an unsafe and dangerous condition for the passage of travelers on foot, and that the accident occurred in consequence of such unsafe condition of the sidewalk, and that the plaintiff could not have known and guarded against the damages by the use of ordinary care and prudence, then the jury will find for the plaintiff, if they find that the negligence of plaintiff did not contribute to the injury.[4]

(5) It is the duty of the city to make and keep its sidewalks reasonably safe for public travel, and that if it fails in the discharge of this duty it is liable to persons sustaining injuries because of such failure. And if the jury believe from the evidence that the sidewalk in question where the plaintiff fell and sustained the injuries complained of in his declaration, was not in such reasonable repair, then they must find for the plaintiff the damages they believe him to have sustained, unless they shall also believe from the evidence that the plaintiff, by his own negligence or want of ordinary care and caution, so far contributed to the misfortune that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened.[5]

(6) The defendant is bound to use reasonable care and precaution to keep and maintain its streets and sidewalks in good and sufficient repair to render them reasonably safe for all persons passing on or over the same; and if the jury believe from the evidence that the defendant failed to use all reasonable care and precaution to keep its sidewalks in such repair, and the injury complained of resulted from that cause, as charged in the declaration, and that the plaintiff sustained damage thereby without negligence on his part, then he is entitled to recover in this suit.[6]

(7) It is the duty of the defendant city to keep its sidewalks in safe condition and free from defects and obstructions dangerous to persons passing along the same with ordinary care; and the

[4] Rice v. City of Des Moines, 40 Iowa, 639.

[5] Gordon v. City of Richmond, 83 Va. 438, 2 S. E. 727.

[6] Moore v. City of Richmond, 85 Va. 541, 8 S. E. 387.

defendant is liable to a person who sustains injury without fault on his part, by reason of its neglect to do so.[7]

(8) It is the duty of the corporation to keep the streets of the city in repair, and this includes the sidewalks for persons on foot as well as the roadways, and it is no answer to a complaint for injury caused by a defect in the sidewalk, that there was a sufficient space thereon by which a safe passage might have been made, unless the injury might have been avoided by proper prudence on the part of the person injured, or unless negligence can be imputed to him as contributing to cause the injury.[8]

(9) The city of I is not an insurer nor a warrantor of the condition of its streets and sidewalks, nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient to relieve it from liability if the streets and sidewalks were in a reasonably safe condition for travel as well by night as by day. If, in this case, it is shown by the evidence that at the place where the plaintiff met with his injury the sidewalk was in a reasonably safe condition for travel, your verdict should be for the defendant.[9]

(10) It is the duty of the defendant city to keep its sidewalks in safe condition and free from defects and obstructions dangerous to persons passing along the same with ordinary care; and the defendant is liable to a person who, without fault on his part, sustains injury by reason of its neglect to do so. But the city is not an insurer nor a warrantor of the condition of its sidewalks and streets, nor is every defect therein actionable, though it may cause injury. It is sufficient to relieve the city from liability if the streets and sidewalks were in a reasonably safe condition for travel as well by night as by day. If, in this case, it is shown by the evidence that at the place where the plaintiff met with his injury the sidewalk was in a reasonably safe condition for travel, the plaintiff cannot recover and the verdict should be for the defendant.[10]

§ 592. Sidewalk presumed reasonably safe.—The court in-

[7] Gordon v. City of Richmond, 83 Va. 438, 2 S. E. 727.

[8] City Council v. Wright, 72 Ala. 411.

[9] City of Indianapolis v. Gaston, 58 Ind. 224.

[10] Gordon v. City of Richmond, 83 Va. 438, 2 S. E. 727; City of Indianapolis v. Gaston, 58 Ind. 224.

structs the jury that a person passing over a sidewalk or street is not bound to exercise more than reasonable care and caution in respect to his own safety. Until he is charged with notice to the contrary, he has a right to presume the same to be in a reasonably safe condition.[11]

§ 593. **Plaintiff knowing unsafe condition.**—(1) If you find from the evidence that the plaintiff knew of the defect, if any, that is a circumstance which you should consider together with all the other circumstances in evidence, in determining the question whether with such knowledge the plaintiff exercised ordinary care in proceeding on the walk known to him to be dangerous, or whether in proceeding he used ordinary care to avoid injury.[12]

(2) If the plaintiff knew the opening or cellar way was in the sidewalk, and he attempted to pass the place where it was, when in consequence of the darkness of the night he could not see it, he has no legal reason to complain of the injury he received on account of the fact that the opening or cellar way was there. In such case he must be regarded as having taken the risk upon himself, and this, too, although at the time the fact of the existence of the opening was not present in the plaintiff's mind.[13]

(3) In determining whether the plaintiff was guilty of a want of care in going upon the sidewalk you will take into consideration the defective condition of the walk at and prior to the time of the injury, as alleged by her in her petition, and which allegation binds her on this branch of the case; her condition, including her pregnancy, and her agility or feebleness owing to said condition or other cause and her knowledge or want of knowledge of the walk, and all the circumstances of the case as established by the evidence: and if you believe, considering the knowledge that the plaintiff had of the walk, if any, her ability to walk upon this kind of a walk at the time and the necessities of the case, that is, the need of her going upon the walk, that she could without unreasonable precaution have taken another way and thus avoided exposing herself to the danger of walking upon this walk in the

[11] City of Beardstown v. Smith, 150 Ill. 173, 37 N. E. 211.

[12] City of South Bend v. Hardy, 98 Ind. 585.

[13] Bruker v. Town of Covington, 69 Ind. 35.

condition it is alleged to have been in at the time. If a reasonably prudent person in the exercise of ordinary care and caution would not in her condition have attempted with her knowledge of the walk, if any, to have gone upon the walk, then she is not entitled to recover.[14]

§ 594. **Care of plaintiff when he knows danger.**—(1) If the plaintiff knew that the defendant or others were making or had made an excavation where the injury was received, then the law would require more care on his part to avoid injury than if he knew nothing about it. When a person knows of an excavation, the law requires of him to exercise such reasonable care as an ordinarily prudent and cautious person would use under like circumstances, and if this is done and injury results the person is without fault.[15]

(2) The plaintiff must satisfy the jury that she was in the exercise of due care at the time of the alleged injury; and if a want of due care on her part contributed in any degree to the injury she cannot recover, though it would not have occurred except for the omission of the town to perform its duty. A knowledge of the condition of the way and its alleged defects would not be conclusive that the plaintiff did not exercise due care; but where a person has knowledge of the defects or reason to apprehend any danger, a much greater degree of care and circumspection is properly required of such person; and if, with her knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way or in proceeding thereon after she had entered, she cannot recover. And whether with her knowledge, and under all the circumstances, the plaintiff is in the exercise of due care, is a question for the jury to determine.[16]

(3) If plaintiff by his own negligence approximately contributed to his own injury, then the defendant is not liable in this suit. In determining the question of negligence on the part of the plaintiff, it will be proper for the jury to take into consideration the hour of the night the injury was received, the business calling the plaintiff to S's saloon, and darkness of the night and

[14] Munger v. Waterloo, 83 Iowa, 562, 49 N. W. 1028.

[15] Town of Elkhart v. Ri ter, 66 Ind. 136.

[16] Whitford v. Inhabitants, 119 Mass. 571.

all the facts and circumstances connected with his visiting said saloon, and whether or not the plaintiff was under the influence of intoxicating liquor.[17]

(4) If you find from the evidence that the plaintiff drove up to the ditch on T street, and that he saw, or could by the exercise of ordinary care and prudence have seen the same, and that he could then have turned back and proceeded upon another route, or that he could have driven safely directly across the ditch, and instead of turning back or driving directly across, he turned to the right and attempted to cross in a diagonal course, and his vehicle was upset into the ditch and he was disabled, then before you can find for the plaintiff you must find from the evidence that he acted with ordinary prudence and care, and that he was guilty of no contributory negligence.[18]

(5) There is evidence that the plaintiff had passed over the walk frequently. She did not testify that she had observed or noticed the dangerous condition of the walk, these loose planks and so on before this time; but whether she had noticed it—whether she ought to have noticed it—is for you to determine. She was not bound to the exercise of extraordinary care, but she was bound to use such care as a person of ordinary prudence, situated as she was under like circumstances would use, and if she neglected to use such care then it would be negligence.[19]

§ 595. **Notice to city of defect or danger necessary.**—(1) If at the time of the injuries complained of, the defendant had a contract with any person to furnish it with lumber by the year or otherwise and to deliver the same to the city, and such person did, in fact, under such contract deliver said lumber and pile the same in the street, then the act of such person or persons in delivering the same was not the act of the city, and the city would not be liable for any negligence of such person in placing the same in the street, unless it had notice thereof, either express or implied.[20]

(2) If the lumber mentioned in the complaint was not placed in

[17] Cramer v. City of Burlington, 39 Iowa, 512.

[18] City of Austin v. Ritz, 72 Tex. 401, 9 S. W. 884.

[19] Fee v. Columbus Borough, 168 Pa. 383, 31 Atl. 1076.

[20] City of Evansville v. Senhenn, 151 Ind. 42, 41 L. R. A. 728, 733, 47 N. E. 634, 51 N. E. 88.

the street by the city, but was placed there by some one else, to be used in the construction or repair for a building or for any other purpose, then the city is not liable for any accident resulting therefrom, unless it had notice, either express or implied, that the same was in the street, and that the same was in an unsafe and dangerous condition.[21]

(3) To entitle the plaintiff to recover against the city in this case, the evidence should show to the satisfaction of the jury one or the other of the following facts, viz., that the city had actual notice of the defect in the sidewalk which caused her injuries, or that such sidewalk had remained in such defective condition for an unreasonable length of time prior to the accident, and if neither of these facts has been shown by the testimony in the case, the plaintiff cannot recover in this action.[22]

(4) In order to charge the defendant with negligence it must appear from the evidence not only that the sidewalk was defective at the time of the alleged injury, but it must further appear that such defect was actually known to the city or some of its officers, whose duty it was to repair such defects or report the same to the defendant, or that the defect had existed for such a length of time prior to the alleged injury that the city, if exercising ordinary diligence, would or should have known of the defect.[23]

§ 596. Notice of unsafe condition may be inferred.—(1) Notice of the defect in the street crossings or sidewalks may be reasonably inferred where it is of such a character or has continued for such a length of time as that the officers of the city, charged with the supervision of its street crossings or sidewalks, might and probably would have discovered it, if they had used ordinary care in the discharge of their duties.[24]

(2) If the sidewalk was properly constructed and afterward became out of repair, then defendant would not be liable unless you find it had notice of such defect. But actual notice need not be proved in all cases. It may be inferred from the notoriety

[21] City of Evansville v. Senhenn, 151 Ind. 42, 41 L. R. A. 728, 733, 47 N. E. 634, 51 N. E. 88.

[22] City of Chicago v. Langlass, 66 Ill. 363.

[23] City of South Omaha v. Wrzensinski (Neb.), 92 N. W. 1045.

[24] City of Indianapolis v. Scott, 72 Ind. 199.

of the defect or danger, from its continuance for such a length of time as to lead to the presumption that the proper officers did, in fact, know or with proper diligence, might have known the same.[25]

(3) In the absence of express notice to the defendant city or its officers, of the defects which caused the injury sustained by the plaintiff, he, the plaintiff, cannot recover unless it is shown from the evidence that the time the sidewalk was out of repair (if you find from the evidence that it was out of repair) was so long that the defendant or its officers should have known it and reported it before the accident, or that the officers of the city were guilty of negligence in not knowing of it and in not repairing it before the accident.[26]

(4) Actual notice need not be shown in all cases. Notice may be inferred from the notoriety of the defect, or from its being so visible and apparent and having continued for such length of time, as that, in the exercise of reasonable observation and care, the proper officers of the city ought to have known of and remedied or removed the defect or obstruction. The evidence in this case fails to show actual notice of the defect or obstruction complained of, if the same existed, to the defendant or its officers, but if the evidence shows that such defect or obstruction had existed for such length of time, was so visible and apparent as that the officers and servants of the defendant ought, in the exercise of ordinary care and observation to have known of and remedied or removed the same before the time of the accident in question, this would be sufficient to show that the defendant was negligent in permitting such defects or obstructions to remain at the time of the accident; but unless the evidence does show that said defects or obstructions were caused by the negligence of the defendant in constructing the culvert at the place in question, as before explained, or that the same was of such notoriety or had existed for such a length of time and were visible and apparent before the accident, as that the officers and servants of the defendant, in the exercise of ordinary care and observation, ought to have known of and remedied or removed said defects

[25] Rice v. City of Des Moines, 40 Iowa, 639.

[26] Kansas City v. Bradbury, 45 Kas. 385, 25 Pac. 889.

or obstructions, the defendant cannot be charged with negligence on account thereof, and the plaintiff cannot recover in this case.[27]

§ 597. **City must take notice of unsafe condition.**—(1) It is not enough to exonerate the city from liability on account of rotten and insecure gutter crossings to show that they were originally well constructed and safe. It is the duty of the city not only to make its gutter crossings safe in the first instance, but to use ordinary care to see that they are kept safe. The city is chargeable with knowledge of the natural tendency of timber to rot and decay by lapse of time and exposure to the elements, and it is its duty to use ordinary care to detect and guard against the same; and if injury results by reason of rotten and insecure timbers in a gutter crossing, it is no excuse that the city officers, charged with the supervision of its streets and sidewalks did not know that the timbers of such gutter crossing were rotten and insecure, if by ordinary care in the discharge of their duties such officers might have discovered the condition thereof in time to have repaired the same before such injury.[28]

(2) If you believe from the evidence that the plaintiff was injured by a defect in the sidewalk of the defendant, as alleged in the plaintiff's declaration, and if you further believe that for several years prior to and at the time of such injury, with knowledge and approval of the superintendent of streets, a book was kept at the police station in the city of Joliet, in which policemen were directed to note defects in sidewalks, and that the policemen of said city were charged with the duty of examining and reporting to their departments defects in sidewalks observed by them, for the benefit of the superintendent of streets, and that at that time the superintendent of streets was accustomed to resort to said books and to the reports of said policemen for information concerning defects in sidewalks, and that one or more policemen in the employ of the defendant noticed the defect in the sidewalk so long before the time of the injury that there was time, in the exercise of ordinary care, to report and repair said defect, then such notice to the city of Joliet, and the failure to remedy the

[27] Hazard v. City of Council Bluffs, 87 Iowa, 54, 53 N. W. 1083.

[28] City of Indianapolis v. Scott, 72 Ind. 199.

defect within a reasonable time after such notice, would constitute negligence on the part of the defendant.[29]

(3) If the jury find from the evidence that the mode or manner in which the sidewalk in question was originally built, and thereafter continued, was so unskillful, negligent and improper as to render it unsafe and hazardous for persons to pass along the same, the said defendant was bound to take notice of its condition, and was liable in damages to any person using ordinary care who sustained personal injury in consequence of the unsafe condition of said sidewalk.[30]

(4) If the jury believe from the evidence that the sidewalk where the plaintiff was injured was uneven, out of repair or fit condition for any reason, and dangerous to persons passing along the same with ordinary care, and that the defendant, or its officers or agents knew, or ought to have known, of its condition, and that the plaintiff, in passing along the said sidewalk with such care as an ordinarily prudent man would have observed, fell thereon by reason of its defective condition, and was injured, then they must find for the plaintiff.[31]

(5) If plaintiff fell by reason of loose planks or other defects in the walk, and if the defects had been there long enough so that the officers of defendant either actually knew of the condition of the walk or should have known its condition by the exercise of ordinary care, and the plaintiff was free from any negligence on her part, she would be entitled to recover.[32]

§ 598. **Injury from accident—No liability.**—(1) If the jury find from the evidence in this case that the cellar doors in the sidewalk, in front of the premises occupied by the defendant, were constructed and maintained in a reasonally safe condition for passing over and upon said doors, and if they further find that said doors, or either of them, were opened at or before the time of the injury complained of by the plaintiff, by some person not in the employ or service of the defendant, without the knowledge or consent of the defendant, or which, by the exer-

[29] City of Joliet v. Looney, 159 Ill. 473, 42 N. E. 854.

[30] Alexander v. Town of Mt. Sterling, 71 Ill. 369.

[31] Gordon v. City of Richmond, 83 Va. 438, 2 S. E. 727.

[32] Fee v. Columbus Borough, 168 Pa. St. 384, 31 Atl. 1076.

cise of ordinary care, the defendant could not have known, then the jury will find for the defendant.[33]

(2) If you find from the evidence that the gutter crossing in question, at the time in question, and in its then condition, and without lights, if there were no lights, was reasonably safe for a person crossing on foot, and in the use of ordinary care, then the plaintiff cannot recover, even though she did step or fall, as she claims, into the adjacent gutter, for, as before stated, the plaintiff must prove, not only that she received the injuries complained of, but she must also prove that the city was guilty of negligence as charged, and that such negligence directly contributed to produce such injuries.[34]

§ 599. **Elements necessary to a recovery.**—(1) Before the plaintiff can recover in this action it must appear, by a preponderance of the evidence (1) that the plaintiff's intestate, S, was killed as a result of a defect or excavation in the sidewalk on J street in the defendant city, as alleged in the declaration, and that such excavation was left in an unsafe condition; and (2) that the defendant city, or its officers, were negligent in permitting said sidewalk to remain in said unsafe condition at the time said S is alleged to have been killed. To charge the defendant with negligence it must appear that the proper officers of the city had notice of the unsafe condition of the sidewalk in time to have prevented the killing of S by falling into said excavation, or that by the exercise of reasonable and ordinary care and diligence they could have known of the unsafe condition of said sidewalk in time to have prevented such killing. By reasonable and ordinary care and diligence is meant that degree of care and prudence which an ordinarily careful and prudent man would reasonably be expected to use under similar circumstances.[35]

(2) If the jury find from the evidence that said crossing was not so reasonably safe for ordinary travel as aforesaid at the time of the alleged injury, by reason of an opening between the stones in said crossing erected for and used as stepping stones therein; and further find that the defendant had notice of such defect in

[33] Fehlhauer v. City of St. Louis (Mo.), 77 S. W. 848.

[34] City of Indianapolis v. Scott, 72 Ind. 200.

[35] Kansas City v. Birmingham, 45 Kas. 214, 25 Pac. 569.

such crossing, or that the same had existed for a time prior to the time of said alleged injury, reasonably sufficient to have enabled the defendant to have ascertained the fact and remedied said defect, and further find that on the night of said day last aforesaid the said plaintiff's wife, while walking over said crossing, and while in the exercise of ordinary care and caution, fell into said opening and was thereby injured, and that her said fall and injury were caused by said alleged defect in said crossing, then they must find for said plaintiff.[36]

§ 600. **Drains left in dangerous condition.**—(1) It is the duty of the defendant to provide for the health of the inhabitants of the city by the construction of all necessary and proper drains. It is a question for the jury to determine, from the evidence, whether the drain on S street, covered at the crossings of the streets and alleys, but left uncovered in the intervening spaces, and without any barrier to prevent travelers falling into the same, was such a construction as that the persons using said street could, with ordinary care, avoid receiving injury therefrom.[37]

(2) If the proof should satisfy you that the drain was one dangerous to persons passing and using ordinary care, but should satisfy you also that the injury in question resulted from the want of ordinary care on behalf of the plaintiff, the plaintiff cannot recover for the injury thus received through plaintiff's want of ordinary care. In considering the question of the use of care on the part of the plaintiff, you will have regard to the age of the plaintiff, and not exact the same degree of care on the part of a child of nine or ten years as would be exacted of and exercised by a person of mature years and discretion.[38]

(3) If the drain was a reasonably proper one in its manner of construction, and the leaving it uncovered and unfenced between the crossings of the streets and alleys was not reasonably liable to result in injury to persons passing and using ordinary care to be expected from those who usually travel streets in the city, the defendant would not be liable, and you should return your verdict for the defendant.[39]

[36] Davenport v. City of Hannibal, 108 Mo. 479, 18 S. W. 1122.

[37] City of Galveston v. Posnainsky, 62 Tex. 122.

[38] City of Galveston v. Posnainsky, 62 Tex. 123.

[39] City of Galveston v. Posnainsky, 62 Tex. 122.

(4) The law requires of one riding in the daytime such attention to the road over which he is about to pass as to see large holes that are conspicuous and obvious and in plain sight, unless some good and sufficient reason excuses the inattention.[40]

§ 601. **Bridges shall be kept in repair.**—(1) The board of commissioners are chargeable with knowledge of the tendency of timbers to decay, and it is incumbent upon the commissioners to use ordinary care in providing against the timbers in a bridge becoming unsafe because of the decay incident to age and long use. They are not bound, however, to do more than use ordinary care and diligence; and if they act with ordinary care and diligence there is no liability![41]

(2) The board of supervisors is charged by law with the duty of supervising and keeping the county bridges in repair. If the members of the board did not possess the requisite skill to discharge the duty of inspection, then it was the duty of the board to appoint or provide some one possessing such skill, and to have all county bridges under their care examined as frequently as men of ordinary prudence and care would deem necessary for the safety of the traveling public, and as experience demonstrated the necessity of examination, and if the board failed to do this such failure would be negligence.[42]

(3) To show an acceptance by the public, binding upon the city, it is not necessary to show any formal action of the council to that effect. If the jury find from the evidence that the city of M expended money in the repair of the bridge, and assumed and exercised control and supervision of the same, and that it was upon a public thoroughfare in the city, this is evidence tending to show an acceptance and assumption of the bridge by the city.[43]

(4) Even if such bridge was in a public street, it must be conceded that it was built by private individuals, and was maintained by private individuals, and that the city had refused to consider the bridge a public structure, and although built in the public street, if it was simply and solely an appendage to H's mills, and

[40] Hill v. Inhabitants of Seekonk, 119 Mass. 88.

[41] Apple v. Board, &c. 127 Ind. 555, 27 N. E. 166. Counties are not now liable for injuries caused by defective bridges, under the law of Indiana. Board of Allman, 142 Ind. 573.

[42] Ferguson v. Davis County, 57 Iowa, 611, 10 N. W. 906.

[43] Shartle v. Minneapolis, 17 Minn. 292.

only useful as connected with the said mills and to the public only as dealing with said mills, and was not, during the time it has stood there, and up to the time of the accident, useful to the public travel along said street to and from places other than H's mills, then the city would not be liable for the injuries suffered by the plaintiff through the falling of said bridge. But, on the other hand, if said bridge stood in the public highway, and appeared to be a part thereof, and the approaches from the traveled part of the street led directly thereto, and it appeared to any one traveling along the highway to be a part of the street in ordinary use, and if it had been and was in actual use and utility generally to the traveling public and used by the general traveling public, then the city, if it had erected at or near the bridge no visible sign or monument warning the public that such bridge was not a part of the street, was under a duty so long as it permitted the bridge to remain in and as a part of the street, subject to general use and utility, to keep the same, or see that the same was kept, in reasonable repair, so that it would be reasonably safe and convenient for public travel.[44]

§ 602. Grades and embankments obstructing natural flow of water.—(1) If said embankment was raised above the established grade of the street it was an obstruction for which the defendant is responsible, though it did not directly create or make the obstruction or authorize it to be done, and if said embankment was and is an obstruction to the natural flow of the water upon and across said street, and causes the water to dam up and flow back upon the adjacent premises to the injury of the owner, the defendant is liable, if, at the time of the injury, the premises were as high as the grade of the street, and if defendant in grading and working its streets obstructs the natural flow of surface water, and by reason of its failure to provide necessary channels for carrying off the water, it is caused to flow in increased quantities upon the adjacent premises to the injury of the owner, for such injury the defendant is liable, if no fault of the owner contributed thereto.[45]

(2) The city, as a public corporation, has a right to establish

[44] Detwiler v. City of Lansing, 95 Mich. 486, 55 N. W. 361.

[45] Damour v. Lyons City, 44 Iowa, 281.

grades for streets, and to fill up the streets to correspond with the grade established, and, if the work is done in a careful and skillful manner, the city will not be liable for injuries to property which are the necessary result of the careful and skillful grading of the streets. On the other hand, if the city, in grading the streets, did the work in an unskillful and improper manner, by making improper or insufficient gutters, by reason of which the water was caused to flow from the street upon the premises of plaintiff, he will be entitled to recover, if you find the injuries complained of resulted from such alleged unskillful construction of the street.[46]

§ 603. **Ice sleet, snow on sidewalks—Liability.** As a general rule, the mere fact that snow or sleet had fallen upon the sidewalk from the clouds, and thereby rendered the sidewalk slippery and difficult to pass over, would not make the city liable therefor, even though such ice and snow should remain upon the walk for an unreasonable length of time after the officers of the city, whose duties required them to look after such matters, had notice of its existence, or after they, in the exercise of reasonable care in performing their duties, ought to have known of its existence; but this rule relates only to the natural conditions resulting from rain or sleet falling and freezing upon the walk, or snow accumulating upon the walk from natural causes. Where, after such ice or snow has thus accumulated, and if by reason of persons traveling over the same, or if from other causes, as from ice or snow thawing and flowing down upon the walk from other lands, the surface of the snow or ice upon the walk becomes rough or rigid, or rounded in form, or lies at an angle or slanting to the plain surface of the walk, so that it becomes difficult and dangerous for persons traveling on foot to pass over the same, when exercising ordinary care, or if the walk is constructed in such manner as not to permit the natural flow of the water and thawing snow from lands adjoining, but dams the same upon the walk and holds the same there until it freezes, and the walk becomes dangerous, by reason thereof, to persons using ordinary care in attempting to pass over the same, or by reason of snow or ice having accumulated on the walk from natural causes, the flowing water and snow from adjoining lands are damned up and held

[46] Ellis v. Iowa City, 29 Iowa, 230.

upon the walk, and frozen there, and by reason thereof making the walk dangerous for persons using ordinary care in passing over the same on foot, then the city becomes liable for injuries caused by such obstruction, provided the person injured did not contribute to his injury by negligence on his part and the obstruction has existed for an unreasonable length of time after the same became known to the city authorities, or ought to have been known to them in the exercise of reasonable care.[47]

§ 604. **Signs overhanging sidewalk—Damage.**—It is the duty of the city to use ordinary care to prevent the construction or maintenance of signs which overhang the sidewalks, unless the same are constructed and suspended with ordinary care and skill, considering the dangers of such structures to the public who travel thereunder upon the sidewalks. A failure of the city to exercise this degree of diligence and care would be such negligence as would make it liable for damages which might result therefrom.[48]

§ 605. **Building permits to obstruct streets.**—When the city issues a building permit authorizing any one to use and obstruct the streets, it is the duty of the corporate authorities to see to it that the persons thus given authority to use the streets shall properly guard and protect such obstructions; and if the city negligently fails to perform its duty in this respect it shall be held responsible to any one who, while in the exercise of due care, may be injured by reason of such obstruction.[49]

§ 606. **Streets and highways shall be kept safe for travel.**—(1) The opening and repairing of streets is a matter of discretion in the city government, but when it undertakes to open or construct streets and travel ways it must so construct them as to render their use reasonably safe to such persons as are naturally expected to use such ways, using such care as such persons ordinarily exercise.[50]

(2) A traveler on a public street is held to the exercise of only

[47] Huston v. City of Council Bluffs, 101 Iowa, 33, 69 N. W. 1130.

[48] Gray v. City of Emporia, 43 Kas. 706, 23 Pac. 944.

[49] City of Indianapolis v. Doherty, 71 Ind. 6.

[50] Galveston v. Posnainsky, 62 Tex. 122.

ordinary care. Slight negligence, which does not amount to a want of ordinary care, will not defeat a recovery for an injury received in consequence of a defect in a public street or highway, provided the evidence shows that the city authorities were guilty of negligence in permitting the defect to exist, and that the traveler was injured thereby, and was using ordinary care to avoid the injury.[51]

(3) A town is not bound to work and prepare for public travel the whole of the land within the limits of the way, but only such portions as are reasonably necessary for that purpose. And a town is not necessarily chargeable with damage arising from every defect existing within the located limits of a highway. Nor would it be liable for obstructions or defects in portions of the highway not a part of the traveled path, and not so connected with it that they would affect the safety or convenience of those traveling on the highway and using the traveled path; nor would the town be legally liable when an injury was sustained by a party using the road for the purpose of passing from his own land, although it was caused by a defect within the limits of the highway, if it was outside the part of the road used for public travel.[52]

(4) The town is not bound to prepare for abutters the means of passing from their estates to the adjoining highway, or of crossing from that part of the highway, not appropriated to travel, to that part which is so appropriated.[53]

§ 607. **Considerations in assessing damages.**—(1) If you find the defendant guilty, then the plaintiff is entitled to recover her actual damages which she has sustained as the direct or proximate result of such injury, such as her loss of time, her pain and suffering, her necessary and reasonable expenses in medical and surgical aid and nursing, as the same may appear from the evidence in the case. And if the jury find from the evidence that the said injury is permanent and incurable, they should take this into consideration in assessing the plaintiff's damages.[54]

(2) If you find, under the evidence and the rules of law I have given you, that the plaintiff is entitled to recover, it will be your

[51] Moore v. City of Richmond, 85 Va. 542, 8 S. E. 387.

[52] Whitford v. Inhabitants, 119 Mass. 570.

[53] Whitford v. Inhabitants, 119 Mass. 570.

[54] City of Chicago v. Stearns, 105 Ill. 554, 557.

duty to assess the amount of damages which, in your judgment, he should recover. In estimating this amount, you may take into consideration expenses actually incurred, loss of time occasioned by the immediate effect of the injuries, and physical and mental suffering caused by the injuries. In addition, you may consider the professional occupation of the plaintiff, and his ability to earn money, and he will be entitled to recover for any permanent reduction of his power to earn money by reason of his injuries; and the amount assessed should be such a sum as, in your judgment, will fully compensate him for the injuries, or any of them, thus sustained.[55]

(3) If you find for the plaintiff, then, in estimating her damages, if any, you should take into consideration the nature of her injuries, the length of time she has been disabled in consequence thereof, if she has been so disabled, and, if she is not yet cured, whether it is probable that a permanent cure can be effected, and, if so, how long it will be before such cure can be effected, her physical and mental sufferings, if any, consequent upon such injuries, and award her such a sum as, in your judgment, will fully compensate her for the injuries which you find are the natural and direct result of the negligence complained of.[56]

§ 608. Matters of evidence—Incompetent evidence.—(1) It was the duty of the plaintiff to exercise ordinary care and diligence in traveling along the sidewalk to avoid accidents, and this care and diligence increases or diminishes with the circumstances of the case for instance, if the night was dark when traveling on the sidewalk, it would be a duty to exercise more care and caution than in open day; and if you find from the evidence that plaintiff did not exercise care and caution commensurate with the surrounding circumstances, and such want of care materially contributed to the injury, then the plaintiff cannot recover.[57]

(2) Evidence of the existence of loose boards other than the one upon which the plaintiff tripped is not competent for your consideration for any purpose except as it may tend to show the want of the exercise of due care on the part of the defendant, which

[55] City of Indianapolis v. Gaston, 58 Ind. 224.

[56] City of Indianapolis v. Scott, 72 Ind. 201.

[57] Kansas City v. Bradbury, 45 Kas. 384, 25 Pac. 889.

would have led to the discovery, on its part, of the fact that the board upon which the plaintiff tripped was loose at the time of the injury.[58]

(3) The condition of the set-off prior to the injury cannot be considered by you in determining whether or not the city has been negligent, if you should find the set-off complained of as dangerous, was, on the evening of the alleged injury, barricaded or protected so as to be reasonably safe to persons walking on the sidewalk there, in the exercise of due care, or such care as an ordinarily prudent man would exercise, taking into consideration the kind of night it was.[59]

§ 609. **Claims against city—Mode of allowing.**—(1) It is provided in substance by the charter of the city of C that all claims against the city shall be audited and allowed by the common council, and that a statement of the claim shall be made by the claimant and filed with the common council, and verified by the oath of the claimant, before it is allowed, and that it shall be a conclusive answer to any suit brought by the claimant to enforce such claim that it had not been presented to the council. In my judgment, that part of the charter is applicable to this case. It is conceded by the plaintiff that, before commencing this suit, he did not present any claim to the common council for a return or payment back to him of this tax, as provided by the charter, and, consequently, for this reason the plaintiff cannot recover in this action, and your verdict should be for the defendant.[60]

[58] Kansas City v. Bradbury, 45 Kas. 385, 25 Pac. 889.

[59] Cramer v. City of Burlington, 42 Iowa, 322.

[60] Crittenden v. City of Mt. Clemens, 86 Mich. 227, 49 N. W. 144.

CHAPTER XLII.

MASTER AND SERVANT.

Sec.
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§ **610. Care of master for safety of servant.**—(1) The measure of care which should have been taken by the defendant company to avoid a responsibility for the injury to the plaintiff is that which a person of ordinary care, prudence and caution would use if his own interests were to be affected, or the whole of the risk were his own. It is such care as a person of ordinary prudence would exercise under the circumstances surrounding the occurrence at the time of the injury.[1]

(2) The defendant was under no greater obligation to care for the safety of the plaintiff than he was to take care of himself; while the company was under obligation to use care for the safety

[1] McVey v. St. Clair Co. 49 W. Va. 420, 38 S. E. 648.

of the plaintiff, he was under a like obligation to use ordinary care for his own safety, and to observe the machinery with which he operated.[2]

(3) The defendant was not bound to use the highest skill, the greatest foresight, and the most extraordinary care in procuring the very best appliances; but rather those appliances which were reasonably best calculated to answer the end proposed.[3]

(4) The measure of care required of the defendant company to avoid liability for injury to the plaintiff, is that which a person of ordinary care, prudence and caution would use if his own interest were to be affected or the whole of the risk were his own. It is such care as a person of ordinary prudence would exercise under the circumstances surrounding the occurrence at the time of the injury. The defendant was not bound to use extraordinary care and the greatest foresight in procuring the very best appliances, but rather those appliances which were reasonably best calculated to answer the end proposed. The defendant was under no greater obligation to care for the safety of the plaintiff than he was to care for himself. While the defendant company was under obligation to use care for the safety of the plaintiff, he was under a like obligation to use ordinary care for his own safety, and to observe the machinery with which he operated.[4]

(5) The law as to the master is, that, in supplying materials, appliances and machinery, he is held to ordinary care, and if unavoidable accidents growing out of hidden defects, or accidents or injuries arising out of the use of machinery where the means of knowledge as to the dangerous character and condition of such machinery are equal on both sides; that is to say, where the employé has equal knowledge with the master as to the condition and character of the machinery he operates, then there can be no recovery by the servant.[5]

(6) If you find that the staging or runaway on which plaintiff was injured was constructed before he was sent up there to work, then it is immaterial as to who or which one of defendant's

[2] McDonald v. Norfolk, &c. R. Co. 95 Va. 104, 27 S. E. 821.

[3] Cooper v. Central R. Co. 44 Iowa, 136.

[4] McVey v. St. Clair Co. 49 W. Va. 420, 38 S. E. 648; Cooper v. Central R. Co. 44 Iowa, 136; McDonald v. Norfolk, &c. R. Co. 95 Va. 104, 27 S. E. 821.

[5] Heltonville Mfg. Co. v. Fields, 138 Ind. 62, 36 N. E. 529.

employés constructed it, as it would then be the duty of the defendant in such case to have exercised reasonable care to have prepared there a staging or runway that was reasonably safe for plaintiff to work upon.[6]

(7) It was the duty of the defendant to exercise ordinary and reasonable care to provide a reasonably safe place for the plaintiff to do the work which he was engaged to perform, and if you find that plaintiff was employed by the defendant and directed to go on top of the elevator in question and do the work he was engaged in at the time of the injury, then it was the duty of the defendant to have exercised ordinary and reasonable care proportionate to the danger, in providing for him a reasonably safe staging or platform on which to do the work; and if you find that defendant failed in this, by omitting to have the boards or planks composing the staging or runway nailed or otherwise properly secured and that in consequence thereof the plaintiff, without fault on his part, and in the exercise of ordinary care was injured, then he is entitled to recover in this action, and you will so find.[7]

(8) If the jury believe from the evidence that the defendant employed the plaintiff's intestate as a brakeman on one of its passenger trains, it became and was the duty of the defendant to provide the said McD with reasonably safe cars and couplings for the performance of the work required of him as such brakeman, and that if the defendant failed to perform its duty in this regard, and did not provide the said McD with reasonably safe and suitable cars and couplings, and that, as a result of such failure of the defendant to perform said duty by providing said McD with reasonably safe and suitable cars and couplings, he was caught between two of defendant's cars, while he was trying to couple them together in the preformance of his duty as said brakeman, and injured as alleged, they should find for the plaintiff, unless they further believe that he was himself guilty of negligence which proximately contributed to his death.[8]

(9) It was the duty of defendant to use all reasonable precautions for the safety of its employés, and among other things it was

[6] Doyle v. Missouri, &c. Co. 140 Mo. 1, 41 S. W. 257.

[7] Doyle v. Missouri, &c. Co. 140 Mo. 1, 41 S. W. 256.

[8] McDonald's Adm'r v. Norfolk, &c. R. Co. 95 Va. 99, 27 S. E. 821.

bound to furnish suitable machinery—materials sound, safe—and to keep it in such condition as would not endanger their safety, such as was least likely to do or cause injury.[9]

§ 611. **Rules for conduct of servants.**—(1) The defendant railroad company has the right to make such rules and regulations for the conduct of its servants and agents while engaged in its service as in its judgment are reasonable and proper, or would conduce to the safety and comfort of its employés; and all servants while engaged in such service with a knowledge of such rules and regulations, are bound to act in conformity therewith; and if injuries are sustained by them while acting in violation thereof, no recovery can be had of the company therefor, if such violation was the cause of or materially contributed to the injury.[10]

(2) It was the duty of the defendant to use ordinary care and prudence in making and publishing to its employes sufficient and necessary rules for the safe running of its trains, and for government of its employés, and as great a degree of care for their safety, taking into consideration their hazardous employment, as could be procured by ordinary care and prudence, and the more hazardous the employment the greater is the degree of care required by the law.[11]

§ 612. **Master must advise servant of danger.**—(1) Before using a highly dangerous explosive it is the duty of the master to ascertain and make known to his servants the dangers to be reasonably apprehended from its use and the proper method of manipulating it with reasonable safety, and the ignorance of the master as to the dangers to be apprehended from its use, or the proper methods of manipulating it, will furnish no excuse when the master, by the exercise of reasonable diligence, could have obtained such knowledge.[12]

(2) If R, the defendant, knew or if he had good reason to believe that rigid or forcible resistance would be offered to him and his parties by parties whom he knew or believed to be there, on that ground or in the vicinity, it was his duty to inform the plaintiff B of the nature of the employment, to disclose to him

[9] Cooper v. Central R. Co. 44 Iowa, 136.

[10] Woolsey v. Lake Shore, &c. R. Co. 33 Ohio St. 227.

[11] Cooper v. Central, &c. R. Co. 44 Iowa, 138.

[12] Bertha Zinc Co. v. Martin, 93 Va. 794, 22 S. E. 869.

that knowledge, so that B might act understandingly, and take the chances, if he chose to do so. If the defendant had such knowledge and concealed it from the plaintiff, then he is liable.[13]

§ 613. **Not a fellow servant—Liability.**—(1) If the plaintiff, being a night watchman of defendant, was at the time of the explosion at the place of explosion, and was sent there in charge of the engine which pulled the car on which was the boiler that afterwards exploded, by direction of S, the regular engineer in charge of said engine, and you further find that under the custom and usage of defendant's road management, the plaintiff was expected or required to obey said directions, and did obey said S's directions, then if the plaintiff was injured by said explosion while at a proper place in carrying out said directions, by the acts of negligence of defendant as charged, the defendant would be liable.[14]

(2) A section master of a railroad company, in charge of a particular section of the company's road, with a force of hands under him, to take care of and preserve said section, is not merely a coemployé with said hands, on an equal footing with them, but the relation between the section master and those working under him is that which exists between a superior and a subordinate, and in all matters pertaining to the particular department to which the section master is engaged, he is the representative of the company, and, therefore, if one who is employed by the section master to work under him on his section is injured by the negligence of the section master, whilst engaged in and about said employment, the company cannot escape liability for said injury upon the ground that the injured party was the coemployé of the section master; but the jury are further instructed that this will not prevent the company from showing, if it can, that, on other grounds or for other reasons, it is not liable to the injured party for the injuries he has sustained.[15]

§ 614. **Injury caused by fellow servant.**—(1) If the jury believe from the evidence that L was the engineer, and M the plaintiff was a brakeman on the same train, working under the same conductor, deriving their authority and compensation from the

[13] Baxter v. Roberts, 44 Cal. 191.
[14] East L. &c. R. Co. v. Scott, 71 Tex. 705, 10 S. W. 298.
[15] Tyler v. Chesapeake, &c. R. Co. 88 Va. 392, 13 S. E. 975.

same source, and were engaged in the same general business of running the train on which they were working, and one not in authority over the other, they were fellow servants, and each took the risk of the other's negligence.[16]

(2) If the plaintiff was, at the time of the explosion, engaged in the management of an engine of defendant on its railroad, then the engineer on the pile driver and plaintiff would be fellow servants, and for an injury resulting to plaintiff from carelessness or negligence of such engineer, plaintiff cannot recover.[17]

(3) The defendant was not an insurer of the life or safety of the plaintiff while he was at work for it; and if you believe from the evidence that this fall was an accident for which no one was to blame, or that it was the result of the carelessness or negligence of the plaintiff or of some fellow servant, then your verdict should be for defendant.[18]

§ 615. **Injury from willful act of servant.**—If the jury believe that the motorman in charge of the defendant's car after he had seen the plaintiff's carriage and had completely stopped his car, wantonly and maliciously and to gratify some private purpose and not because it was necessary that he should again start said car, in pursuance of his employment again started said car and ran into the plaintiff's carriage and frightened the plaintiff's horse and caused the accident, then the defendant is not responsible for such acts on the part of the motorman, and the verdict of the jury must be for the defendant.[19]

§ 616. **Burden on plaintiff to show negligence.**—(1) The mere fact that there may have been decayed ties in the roadbed at the point of the accident does not authorize you to find for plaintiff. You must further believe that the decayed condition of the ties, if they were decayed, was the cause of the wreck and that defendant knew, or by the exercise of ordinary care, might have known of the decayed condition of the ties, and

[16] McDonald v. Norfolk, &c. R. Co. 95 Va. 104, 27 S. E. 821. As to the changes made in this rule by the Employer's Liability acts in various states, see Pittsburgh, &c. R. Co. v. Montgomery, 152 Ind. 1, 49 N. E. 582; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 60 N. E. 943.

[17] East L. &c. R. Co. v. Scott, 71 Tex. 705 10 S. W. 298. See Jarvis v. Hitch, 161 Ind. 217, 67 N. E. 1057.

[18] Doyle v. Missouri, K. & T. T. Co. 140 Mo. 1, 41 S. W. 257.

[19] Baltimore & O. R. Co. v. Pierce, 89 Md. 497, 43 Atl. 940. But see Indianapolis, &c. R. Co. v. Boettcher, 131 Ind. 82, 88, 28 N. E. 551.

that the wreck was caused by the fact that the ties were decayed, and unless you so believe, you will find for the defendant on this issue. You are not authorized to find for the plaintiff from the fact alone that the ties were rotten at the point where the wreck occurred.[20]

(2) The only charge of negligence made in the petition against this defendant which you are to consider, is concerning the removal of the brake staffs from the flat cars which were loaded with steel, and it devolves upon the plaintiff to prove that the removal of said brake staffs was an act of negligence. The jury cannot presume that it was a negligent act from the fact, if it be a fact, that the cars escaped from the side track on to the main track, and there collided with B's train.[21]

(3) To entitle the plaintiff to recover in this action, the plaintiff must show to the satisfaction of the jury, or else it must otherwise appear in the evidence to the satisfaction of the jury, that the deceased was injured by the negligence of the defendant, whilst the deceased was observing ordinary care on his part to avoid injury, or did not by his own negligence contribute to the injury.[22]

(4) Whenever a claim for damages is asserted the injury must be shown by the plaintiff to have been caused by the negligence of the defendant, and the happening of the accident, without additional proof that it was caused by the negligence of the defendant, is not sufficient to establish the liability of defendant.[23]

§ **617. Servant assumes risks incident to employment.**—(1) If it be conceded that the switching of cars from the main track to a side track while the train is in motion is a dangerous mode of doing business and ought to be regarded as evidence of negligence, still all employés who entered the service of the company with full knowledge that such was the practice, or acquired such knowledge afterwards, and remained in the service without the least objection thereto, and fully acquiesced therein, must be regarded as having consented to the practice or as having

[20] Gorham v. Kansas C. & S. R. Co. 113 Mo. 411, 20 S. W. 1060.

[21] Browning v. Wabash W. R. Co. 124 Mo. 65, 27 S. W. 644.

[22] Way v. Illinois Cent. R. Co. 40 Iowa, 344.

[23] Richmond & D. R. Co. v. Burnett, 88 Va. 540, 14 S. E. 372.

waived any objection thereto and therefore as having taken the risk upon themselves.[24]

(2) If you believe from the testimony that the plaintiff was an experienced railroad man, both as engineer and conductor, at the time of the accident, and that he permitted the train under his charge to be run at an unusual and reckless rate of speed, and that said unusual and reckless rate of speed of the train was the proximate cause of the accident, and that, but for such rate of speed, the accident would not have happened, notwithstanding defects (if there were any) of the track or cars or manner of loading the cars of the defendant, then the plaintiff cannot recover, and your finding will be for defendant.[25]

(3) The plaintiff in the performance of his duties as conductor of the train of the defendant, assumed all the usual and ordinary risks incident to his business, and if injured by any accident arising from these risks, the defendant is not liable to him therefor; if you believe from the testimony that the plaintiff created an extraordinary risk for himself by permitting the train to run at an unusually rapid rate of speed and was injured on that account, your finding will be for defendant.[26]

(4) The plaintiff, by entering the employment of the defendant, and engaging in the work upon the top of the elevator, assumed the ordinary risks and dangers incident thereto, not only so far as they were known to him, but also so far as they could have been known to him by the exercise of ordinary care upon his part; and if you believe from the evidence that plaintiff at and prior to the time of the fall knew the condition of the runway, and the manner in which it was constructed and laid, or that he could have known its condition and the manner in which it was laid by the exercise of ordinary care and prudence upon his part, then the plaintiff cannot recover, and your verdict should be for the defendant.[27]

(5) When R the plaintiff sought employment at the hands of the defendant he was held to an implied representation that he was competent to perform the duties of the position he sought and competent to apprehend and avoid all danger that might be dis-

[24] Lake Shore, &c. R. Co. v. Knittal, 33 Ohio St. 471.

[25] Gorham v. Kansas C. & S. R. Co. 113 Mo. 413, 20 S. W. 1060.

[26] Gorham v. Kansas C. & S. R. Co. 113 Mo. 413, 20 S. W. 1060.

[27] Doyle v. Missouri, &c. T. Co. 140 Mo. 1, 41 S. W. 257.

covered by the exercise of ordinary care and prudence, and for the purposes of this case, the plaintiff is to be treated as a brakeman and switchman of ordinary experience and skill.[28]

(6) The law presumes the compensation paid a person employed as a brakeman on a railroad is in part, a consideration for the risks, hazards and dangers ordinarily incident to that service.[29]

(7) When the plaintiff entered the service of the defendant company, the law presumes that he contracted with reference to the risks and hazards incident to the business of his employment as the company conducted it at the time he entered it, and that his compensation was adjusted accordingly.[30]

§ 618. **Servant knowing of danger is negligent.**—(1) If the alleged dangers and improper condition of the track and the situation of the car on the side track was plain to be seen by R the plaintiff, or if he ought, as an ordinarily prudent person, to have seen or known of it, then there can be no recovery, and if he had reasonable opportunity to see or know of the situation as touching the alleged condition of the tracks and car on the side track, then he is, in law, held to such knowledge; or if on or before the occasion of the injury he had knowledge or reasonable means of knowledge as a man of ordinary prudence of the condition of the track and car on the side track, and incurred the danger with such knowledge or means of knowledge, then there can be no recovery.[31]

(2) It was the plaintiff's duty to be careful, and to guard against accidents; and if you believe from the evidence that the plaintiff knew the manner in which the board upon which he claims to have stepped was laid, or if the condition of the board was apparent, and plaintiff by looking and using ordinary care, could readily have discovered the danger, then your verdict should be for the defendant.[32]

(3) The defendant was under no obligation to keep the loose boards picked up and it was plaintiff's duty to observe when

[28] Pennsylvania Co. v. McCormack, 131 Ind. 250, 30 N. E. 27.

[29] Way v. Illinois Cent. R. Co. 40 Iowa, 344.

[30] Norfolk & W. R. Co. v. Ampey, 93 Va. 114, 25 S. E. 226.

[31] Pennsylvania Co. v. McCormack, 131 Ind. 250, 30 N. E. 27.

[32] Doyle v. Missouri, K. & T. T. Co. 140 Mo. 1, 41 S. W. 257.

and upon what he was stepping, and if his fall was due to his stepping upon a loose board near the runway, or where he was working, then your verdict should be for the defendant.[33]

(4) If the plaintiff knew that the cross ties in defendant's roadbed were rotten, if they were rotten, or if the condition of the ties were such that an ordinarily observant person would have known before the accident, and he continued in the employment of said company after becoming possessed of such knowledge, then he cannot recover if the condition of the ties was the proximate cause of the injury.[34]

(5) If the plainitff knew that the inside rail of defendant's road was higher than the outside one, if such was the fact, or if the same was of that character that an ordinarily observant person would have known, and he continued in the employment of defendant or entered thereon with knowledge of the fact, he cannot recover, if the height of the rail was the proximate cause of the injury.[35]

(6) If the plaintiff knew of the defective condition of the brakes, if they were defective, or could have known, if they were of such a character, as an ordinarily observant person would have known, and the condition of the brakes caused the wreck, plaintiff cannot recover.[36]

(7) If the jury find from the evidence that the defendant's shipping room at or about the elevator hole mentioned in the evidence was dark and unlighted, and if the jury further find from the evidence that plaintiff, before his injury knew that said room was dark and unlighted and that there was some risk or danger of falling into the elevator hole by reason of said condition of said room, while undertaking to use the elevator in the discharge of the duties of his employment, and if the jury find from the evidence that defendant was maintaining said elevator opening in said floor without causing the same to be effectually barred or closed by railing, gate or other contrivance for the prevention of accidents therefrom; and if the jury find from the evidence that the plaintiff knew before his injury that defendant was maintaining said elevator

[33] Doyle v. Missouri, K. & T. T. Co. 140 Mo. 1, 41 S. W. 257.

[34] Gorham v. Kansas C. & S. R. Co. 113 Mo. 412, 20 S. W. 1060.

[35] Gorham v. Kansas C. & S. R. Co. 113 Mo. 412, 20 S. W. 1060.

[36] Gorham v. Kansas C. & S. R. Co. 113 Mo. 412, 20 S. W. 1060.

opening without such guard or protection being closed, yet if the jury further find from the evidence that said condition of said room and elevator opening and the danger arising therefrom were not such as to threaten immediate injury to plaintiff while in the defendant's service in the discharge of the duty of his employment, and was not such that a person of ordinary prudence while exercising care and caution would not have undertaken to have remained in defendant's service and discharge the duties of his employment, then the fact alone that plaintiff continued in defendant's service under the circumstances will not of itself defeat the action.[37]

§ 619. Servant continuing in service after knowledge of danger.—(1) If you believe from the evidence in this case that the proximity of said platform to the track and to the cars as they passed was plain and apparent, and the liability to injury therefrom was manifest, and that deceased knew of such proximity, or, by the exercise of care to avoid injury to himself, might have known, and with such knowledge or opportunity of knowledge, remained in defendant's employ, and continued to work in the vicinity thereof without objection or protest, and without promise of amendment, then plaintiff cannot recover in this action.[38]

(2) If you believe from the evidence that the plaintiff knew or had the same means of knowing as his employer, of the danger to which he would be exposed in performing services at said place, and further find from the evidence that the plaintiff failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances, to avoid injury from such danger, and that by reason of his omission to observe that measure of caution, he was injured, he cannot recover; unless, however, you believe from the evidence that at the time plaintiff was hurt he was a youth of immature judgment and inexperienced in the business in which he was employed and that the perils of his undertaking were not communicated or known to him, and that by reason of such immaturity of judgment and inexperience and want of informa-

[37] Wendler v. People's H. F. Co. 165 Mo. 539, 65 S. W. 737.

[38] Perigo v. Chicago, &c. R. Co. 52 Iowa, 277, 3 N. W. 43.

tion as to the perils of the employment he was incapable of understanding the nature and extent of the hazard to which he was subjected; in which event in order to prevent a recovery by him you must believe that he failed to exercise that degree of care that persons of his age, undeveloped judgment and want of information would ordinarily use under such circumstances.

From what has been stated you will perceive that it is not the mere fact of the plaintiff's minority at the time he was hurt that would relieve him from the care required of an adult, but such immaturity of judgment, inexperience and lack of information as has been defined to you would be necessary to relieve him from that degree of care.[39]

(3) Although the jury may believe from the evidence that H was not a capable man to run the mine machine referred to in the evidence in this cause, and did not run such machine in a capable manner at the time of the injury to B, yet, if they believe from the evidence that the said B had knowledge of the danger of said machine when in motion, and could have avoided the injury to himself by the use of ordinary care upon his part, he, the said B would be guilty of contributory negligence and the jury should find for the defendant.[40]

(4) If the jury shall find from the evidence that A, the plaintiff, entered the employ of the defendant as a freight brakeman on or about the eleventh day of June, 1890, and continued there in that capacity until his injury on August twenty-fifth, 1890, and during all that time was passing through the tunnel mentioned, generally twice a day, and often more frequently, and that it required only a few days to become acquainted with the tunnel and the conditions of work therein, and after such opportunity of knowing the same he continued in such employment as aforesaid, then he took the risk of such employment and the plaintiff cannot recover in this action even though the jury shall further find that the accident by which he lost his life was caused by the defective construction of the tunnel or lack of ventilation of the same.[41]

[39] Texas, &c. R. Co. v. Brick, 83 Tex. 598.

[40] McVey v. St. Clair Co. 49 W. Va. 420, 38 S. E. 648.

[41] Baltimore & O. R. Co. v. Maryland, 75 Md. 153, 23 Atl. 310.

(5) If you find that said boiler exploded because of defects in material and plaintiff knew of such defects before the explosion or might have known of the same by the use of observation in the course of his employment, and by placing himself near the same, was injured by the explosion, or if such boiler exploded in consequence of incompetency of the engineer and plaintiff knew of such incompetency before the explosion, then he cannot recover.[42]

§ 620. Servant continuing after master's promise to repair. (1) The court instructs the jury that if they believe, from the evidence, that the plaintiff, while in the exercise of ordinary care and caution for his own personal safety, was injured in consequence of the defective condition of the machinery used by the defendants as alleged in the second count of the declaration, if they, the jury, believe from the evidence, that the same was so defective; and if they further believe, from the evidence, that the plaintiff repeatedly, and shortly before receiveing such injury, called the attention of the defendant's superintendent to said defects, if any, and that said superintendent there had authority to remedy said defects, if any, and that thereupon said superintendent repeatedly, and shortly before the injury, promised said plaintiff, that said defects, if any, should be remedied, and that said plaintiff, relying upon such promises remains in the employ of said defendants until the injury, as aforesaid; and if the jury further believe, from the evidence, that the danger from such defective machinery, if any, was not so imminent that no prudent person would have undertaken to perform the service required of the plaintff, then by so remaining for a reasonable time thereafter the plaintiff would not assume the risks incident to such defective machinery, if the same was defective during such reasonable time.[43]

(2) If the jury believe, from the evidence, that the deceased, Charles Castaine, while in the exercise of due care and caution, was killed in consequence of the defective condition of the engine used by the defendant, as alleged in the declaration, and if they further believe, from the evidence, that the said

[42] East Line, &c. R. Co. v. Scott, 71 Tex. 704, 10 S. W. 298.

[43] Taylor v. Felsing, 164 Ill. 333, 45 N. E. 161.

Castaine, shortly before his death, called to the attention of the superintendent and foreman, carpenters of the defendant, the said defects and that said persons, or either of them, then had authority to remedy said defects, and that said persons, or either of them, thereupon promised the said Castaine that said defects should be remedied, and that said Castaine relying upon such promise, remained in the employ of the defendant, until he was killed as aforesaid, then the jury must find for the plaintiff.[44]

(3) If the drawbar was defective and the plaintiff had knowledge of it and made objection thereto and was induced to remain in the defendant's employment by promise or assurance of its repair, and within a reasonable time, and before its repair, and and not having waived the objection, he was injured by reason of such defect, and he did not contribute to the injury by his own fault or negligence, he will be entitled to recover, but in such case greater care will be required of him than if he had not known of the defect.[45]

§ 621. **Servant does not assume risks of negligence.**—(1) While a servant in accepting employment, assumes the ordinary risk incident to it, he does not assume those occasioned by the negligence of the master; and while the plaintiff in this case assumed the ordinary risks incident to the work he was called upon to perform, he did not assume those, if there were any such, arising from negligence of the defendant.[46].

(2) If you find from the evidence that plaintiff was rightfully at the place of the explosion and you further find that he left his engine and went to the boiler that exploded, and you find that he had no reason to believe that said boiler was in danger of explosion, and in so going near it he did what was usual in such a case on the part of trainmen, and there was no apparent danger in so doing, and was such an act of a man of ordinary prudence and caution would commit, then the same would not defeat his right to recover if he was otherwise entitled to recover, under the evidence and instructions herein given.[47]

[44] Missouri Furnace Co. v. Abend, 107 Ill. 49. Held not assuming that the deceased was in the exercise of due care and diligence.

[45] Belair v. Chicago & N. W. R. Co. 43 Iowa, 671.

[46] Doyle v. Missouri, &c. T. Co. 140 Mo. 1, 41 S. W. 257.

[47] East Line, &c. R. Co. v. Scott, 71 Tex. 705, 10 S. W. 298.

(3) If the jury shall believe from the evidence that at the time of the collision, which resulted in the injuries to the plaintiff of which he complains in this action, E, as section master of the defendant company on that part of said company's road on which the collision occurred, was on the hand-car involved in said collision, and in the control and management of the same, and that the plaintiff was then and there on said hand-car by permission of said E, and without knowing that it was contrary to the rules of the defendant company for him to be on said hand-car, and that the injuries sustained by the plaintiff in said collision resulted from the gross negligence of the defendant company, or of its agents or any of them, whilst the plaintiff was on said hand-car, then the court instructs the jury that the defendant company is liable to the plaintiff in this action for said injuries.[48]

§ **622. Servant may assume appliances to be safe.**—(1) An employé or servant has the right to assume in the absence of knowledge to the contrary, that the appliances which he is called upon to use in the performance of his work, are reasonably safe, and if there are latent defects of which he has no knowledge, or which are not obvious to him while using ordinary care and observation, then he does not assume the risk attendant thereon.[49]

(2) A railroad company is required to use ordinary care in constructing and maintaining its roadway, switches, and appliances in such a manner and condition that its servant can do and perform all the labor and duties required of him with reasonable safety, and a servant has a right to presume that the company has in these respects done its duty, and a servant does not assume risks flowing from his employer's negligence in these duties, nor is there imposed upon him any duty of watchfulness and care to discover defects in the roadway or switches, when he has no notice of danger and when not so glaring and apparent as to be open to the observation of ordinarily prudent men, and when not specially directed thereto by his employer, and he will not be presumed to know of

[48] Tyler v. Chesapeake & O. R. Co. 88 Va. 391, 13 S. E. 975.

[49] Doyle v. Missouri, &c. T. Co. 140 Mo. 1, 41 S. W. 256.

danger therein when of such character that they might well escape the observation of a prudent person.[50]

(3) The plaintiff had a right to assume and rely and act upon the assumption that the defendant had used reasonable care in furnishing a reasonably safe scaffolding, staging or platform, upon which he was required to pass in the duties of his employment, if he was so required to pass; and that plaintiff was not required to search or inspect such staging, scaffolding or platform for defects therein that were not obvious and apparent.[51]

(4) If the jury believe from the evidence that it is dangerous to thaw frozen dynamite by an open fire, and that the method of thawing dynamite by an open fire is not reasonably safe, and that such dangers could be avoided or greatly reduced by the use of appliances and methods, which were within easy reach of the master, and that the existence of such danger and the means of avoiding it or greatly reducing it, were known to the master, or by the exercise of reasonable care and diligence on his part could have been known to him, that it was a duty that the master owed his servants to adopt such methods and use such appliances as were reasonably safe, and any other methods which were not reasonably safe will not excuse the master for injuries to the servant resulting therefrom.[52]

§ 623. **Servant injured when not at his place.**—(1) If you find from the evidence that the plaintiff was injured in the manner as alleged, and that at the time of the injury he was in the employ of the defendant as night watchman, and that his duties as such were performed at a different place from that at which the injury occurred, then before plaintiff can recover, he must show that he was properly at the place where the injury occurred, and that his presence there was in the performance of a service for defendant.[53]

(2) If the evidence should show that the plaintiff was injured by such explosion as alleged, yet if it also appears that plaintiff at the time of such injury was away from the place at

[50] Pennsylvania Co. v. McCormack, 131 Ind. 250, 30 N. E. 27.

[51] Doyle v. Missouri, K. & T. T. Co. 140 Mo. 1, 41 S. W. 257.

[52] Bertha Zinc Co. v. Martin, 93 Va. 794, 22 S. E. 869.

[53] East L. &c. R. Co. v. Scott, 71 Tex. 705, 10 S. W. 298.

which his duties required him to be (if you find that he was in defendant's employment) and that he voluntarily placed himself in a position of danger and in consequence thereof received the injuries complained of, then he could not recover, no matter whether such boiler was defective or the engineer in charge was incompetent or not.[54]

§ **624. Brakeman injured while coupling—Liability.**—(1) If you believe from the evidence that the plaintiff while in the employ of the defendant as freight brakeman and in the discharge of his duties as such brakeman, attempted to couple together two freight cars on the defendant's road, and in so doing used that care and caution for his own safety that the ordinarily careful man would have exercised, and if you believe from the evidence that the side-track where the cars were, was slanting and sidling, and as a result thereof not a reasonably safe place to work, then and in that case, if you believe, from the evidence, that the plaintiff was injured as charged in the declaration as a result thereof, and that the unsafe condition of the track, if you believe, from the evidence, it was so unsafe, was caused by the defendant not exercising reasonable care to provide a reasonably safe track, it will be your duty to find for the plaintiff.[55]

(2) If the jury believe from the evidence that at the time of the injury to the plaintiff there was trouble with the couplings which the plaintiff was attempting to make, and that the conductor J, knew the fact, and that said conductor ordered him to make the coupling with his hand and was told by the plaintiff that he would do so, but that he, the said conductor, must have the train come back "very light"; that the conductor, instead of signaling the engineer to come back gently, gave the signal to come in the usual way when couplings are to be made, and that the said injury occurred in consequence of his, the said conductor's, giving the signal as he did, and not in giving the signal to come back gently, they must find a verdict for the plaintiff.[56]

(3) The jury are instructed, as a matter of law, that it was the

[54] East Line, &c. R. Co. v. Scott, 71 Tex. 704, 10 S. W. 298.

[55] Malott v. Hood, 201 Ill. 206, 66 N. E. 247.

[56] Norfolk & W. R. Co. v. Ampey, 93 Va. 112, 25 S. E. 226.

duty of the plaintiff, before attempting to uncouple the car in question, to use ordinary and reasonable care to ascertain whether it was safe to do so or not while the train was in motion; and if the jury believe from the evidence, that it was not safe for the plaintiff to uncouple said car at the time he attempted it, and that the plaintiff, knew, or might by the exercise of ordinary care have known, that it was not safe to attempt it, then the plaintiff cannot recover, and the verdict should be for the defendant.[57]

§ 625. **Question of negligence submitted to jury.**—(1) If the jury believe from the evidence that the main and side tracks of the defendant's road at B were, on July 13, 1888, on a grade that descended eastward and that defendant's division road master at or about said first-named day, negligently caused the brake staffs to be taken off of nine or more flat cars and the same to be loaded with iron or steel rails and then set in upon said B side track without any brakes set, or that could be set or other reasonable or safe means or appliances for securing them in their places, or for stopping them if put in motion, so that said cars could not be safely coupled up or handled, and were liable to move or be easily put in motion and to escape onto defendant's other side or main track and obstruct the same, and that in direct consequence of said negligent acts of defendant's servants and agents (if they find them negligent) said cars did escape from said side track onto defendant's main line and collided with train number twenty-seven, whereby plaintiff's husband, without any negligence on his part contributing thereto, was killed, then the jury will find for plaintiff.[58]

(2) In determining the questions of negligence in this case the jury should take into consideration the conduct of both parties at the time of the alleged injury, as disclosed by the evidence: and if the jury believe, from the evidence, that the injury complained of was caused by the negligence of the defendant's servants, as described in the declaration, and if the jury further believe, from the evidence in the case, that the plaintiff was

[57] Chicago, &c. R. Co. v. Warner, 108 Ill. 538, 553. Held error to refuse this instruction under the evidence.

[58] Browning v. Wabash W. R. Co. 124 Mo. 55, 27 S. W. 644.

without fault, and was exercising ordinary care and prudence in the discharge of his duties as conductor of the dummy train, then the plaintiff is entitled to recover in this case such dam ages as the jury may believe, from all the evidence, he is entitled to receive, as compensation for all the damages received and suffered by said plaintiff in the premises, provided the jury find, from the evidence, that the plaintiff was injured as described in the declaration.[59]

§ 626. **Servant discharged for cause—No liability.**—(1) If the plaintiff without excuse conducted himself generally toward his superior officer and coemployés in such a way as to interfere with the harmonious transaction of business and to render it injurious to the interest of the defendant to retain him in its service, then the defendant had the right to discharge him and he is not entitled to recover.[60]

(2) Although a good cause for the discharge of the servant existed at the time of his discharge, and was not known to the master at the time, nevertheless he may avail himself of this cause as a defense to this action.[61]

(3) If the plaintiff without excuse conducted himself generally toward his superior officer and employés in such a way as to interfere with the harmonious transaction of business and to render it injurious to the interests of his employer, the defendant, to retain him in its service, then the defendant had the right to discharge him, and the plaintiff is not entitled to recover; and although the defendant may not have known that a good cause for discharge existed at the time of discharging the plaintiff, yet if in fact such good cause actually did exist at the time of such discharge, it is nevertheless a proper defense.[62]

[59] Chicago & E. R. Co. v. Holland, 122 Ill. 470, 13 N. E. 145. This instruction does not authorize the jury to give exemplary damages.

[60] Equitable E. Asso. v. Fisher, 71 Md. 436, 18 Atl. 808.

[61] Crescent Horse Shoe & Iron Co. v. Eynon, 95 Va. 153, 27 S. E. 935.

[62] Equitable E. Asso. v. Fisher, 71 Md. 436, 18 Atl. 808; Crescent Horse-Shoe & I. Co. v. Eynon, 95 Va. 153, 27 S. E 935.

CHAPTER XLIII.

NEGLIGENCE OF RAILROADS.

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§ **627. Care required of the plaintiff.**—(1) There is no law requiring a man in the lawful use of a public street approaching a railroad crossing, to stop his vehicle before crossing it, but he is bound to use such care, under all the circumstances as a man

of ordinary prudence would have exercised under like circumstances, and if you find from the evidence that H exercised such care at the time of and preceding the injury, he was not guilty of contributory negligence.[1]

(2) The plaintiff was bound to use ordinary care under the circumstances shown to have existed in this case. He was bound to approach the railroad carefully and to look and listen for the approach of trains; and if the evidence shows that he did do this with that degree of care that an ordinarily prudent person would have exercised under all the circumstances and was unable to hear or see the train approaching, until it was too late to avoid the collision, then he is not guilty of contributory negligence.[2]

(3) It is the duty of every person when going upon or across a railroad track to look in each direction to see if cars are approaching, and a failure to do so amounts to a want of ordinary care.[3]

(4) If it affirmatively appears from the evidence that the plaintiff did not use due care to discover the approach of cars upon the defendant's track before he attempted to cross the same, he cannot recover for any alleged negligence of the defendant.[4]

(5) The deceased was bound to use the same care in protecting himself that the defendant company was bound to use in seeing that no person came to injury by the management of its cars and engines. That is, he was bound to use such care and prudence as a reasonable, prudent man would use in protecting himself against any injury. It was his duty to use his senses, in approaching the railway track, to discover whether or not there was an approaching train or locomotive which might injure him; to make such reasonable use of his eyes and other senses as a reasonable and prudent man would make, and if by the use of his senses he could have avoided the danger, then he cannot recover from the company. But if he exercised such care as a reasonable and prudent man would exercise, and if the defendant was guilty of neglect in the running of the engine and the de-

[1] Pennsylvania Co. v. Horton, 132 Ind. 194, 31 N. E. 45.

[2] Pennsylvania Co. v. Horton, 132 Ind. 194, 31 N. E. 45.

[3] Illinois Cent. R. Co. v. Goddard, 72 Ill. 569; Chicago, &c. R. Co. v. Hatch, 79 Ill. 137.

[4] Indianapolis St. R. Co. v. Taylor, 158 Ind. 279, 63 N. E. 456.

ceased was killed by reason of that, then the company is responsible.[5]

(6) If you shall find from the evidence that the plaintiff, at the time he was injured was walking up the main track of the railroad and was not using the county road as a crossing to reach the caboose, the fact no signal was given by the engineer in charge of the engine, of the moving of the engine and cars attached, toward the crossing, would not be such neglect as would render the company liable for the injury, unless the conductor or engineer in charge of the train or engine knew, at the time the engine was being backed, that the plaintiff was on the track and they then failed to give him warning by signal or otherwise of the approach of the train in the same direction on the same track.[6]

(7) Evidence of the general habit of M when crossing the railroads may be taken into consideration by the jury together with all the facts and circumstances in evidence in determining the degree of care used by the deceased while attempting to cross the defendant's railroad track at the time of the killing, and that it was not necessary that the plaintiff should show by an eye-witness as to M's care and caution exercised at the time of the killing in order to entitle the plaintiff to recover, provided you believe from the evidence and all the facts and circumstances in evidence that they were exercising ordinary care and caution for their own safety at the time of attempting to cross said railroad track.[7]

(8) The fault or negligence on the part of plaintiff which would preclude him from recovery, if there was negligence both upon his part and upon the part of the company, its agents or employés, is not the least degree of fault or negligence, but it must be such a degree as to amount to a want of ordinary care on his part, under all the circumstances, at the time of the injury.[8]

§ 628. **Care of plaintiff—Exceptions.**—(1) The general rule that a person in crossing over a railroad track at a public crossing must use his senses as to sight, is subject to the following exception: That where the view of the track is obstructed, and

[5] Railway Co. v. Schneider, 45 Ohio St. 688.

[6] Railroad Co. v. Depew, 40 Ohio St. 124.

[7] McNulta v. Lockridge, 137 Ill. 275, 27 N. E. 452.

[8] Texas & N. O. R. Co. v. Carr (Tex. Cv. App.), 42 S. W. 126.

hence, where the injured party, not being able to see, is obliged to act upon his judgment at the time; in other words, where compliance with the rule is impracticable or unavailing.[9]

(2) If the jury believe from the evidence that the defendants, at the crossing where the accident occurred have suffered to remain on their land high embankments on the side of the road or street, so as to exclude to a traveler a view of their track when about to go upon said track, the traveler is excused from looking, and the failure to look cannot be imputed to him as negligence, but it throws upon him additional care in listening, and to take such other precautions for his safety as may be reasonably necessary.[10]

§ 629. **The same—Instructions for defendant.**—(1) The plaintiff was bound to use reasonable care on her part to avoid injury to which the defendant's negligence, if any, may have exposed her. Reasonable care may be defined to be that degree of care which a prudent person would have exercised under the circumstances in which the plaintiff found herself at that time. By this test, was the plaintiff free from negligence herself? Might she, situated as she was, by the exercise of ordinary prudence have avoided injury to herself notwithstanding the negligent conduct of the defendant, if any? If so, she cannot recover if she failed to exercise such care. In considering this question, all the evidence bearing upon the points indicated in the foregoing instruction, as to the defendant's negligence, is proper to be considered also. If in the light of all these circumstances in evidence, a reasonably prudent person, exercising her faculties of sight and hearing, would have seen or heard and avoided the danger; or if the danger was apparent and easily avoidable to a person exercising reasonable care, as before defined, the plaintiff cannot recover, if she negligently failed to avoid it, and must suffer the conseqeunces of her own carelessness.[11]

(2) The fact that the train was behind time, and was running faster than its usual speed at the crossing to make up time, did not excuse the plaintiff or her father from exercising the care and

[9] Kimball v. Friend's Adm. 95 Va. 126, 27 S. E. 901.

[10] Kimball v. Friend, 95 Va. 128, 27 S. E. 901.

[11] Prothero v. Citizens' St. R. Co. 134 Ind. 435, 33 N. E. 765.

caution required of them, when the train was on time and running at its usual rate of speed at that crossing.[12]

(3) If there were any obstructions to the sight or hearing in the direction of the approaching train, as the plaintiff and her father neared the crossing, the obstructions required increased care on the part of the plaintiff and her father on approaching the crossing. In such case the care must be in proportion to the increase of the danger that may come from the use of the highway at such a place.[13]

(4) The rights and duties of persons occupying the public streets are reciprocal, and although it is the duty of a street car company operating its cars upon such a street to use due and ordinary care for the safety of persons using such street, yet it is also the duty of such persons to use the same with due and ordinary care for their own safety; and if you believe, from the evidence, that the plaintiff in this case failed to use the care which a reasonably prudent person would have used under similar circumstances, to avoid the injury for which this suit is brought, then he cannot recover.[14]

(5) The issues you are sworn to try in this case are as follows: Was the electric car which collided with the wagon in question carelessly and improperly driven or managed by the servant or servants of the defendant? Was the said electric car traveling at an unnecessarily high or dangerous rate of speed? Did the servant or servants of the defendant negligently fail to ring a gong or bell at the time and place in question? Did the servant or servants of the defendant in charge of said car know that W was in a position of peril, in time to have stopped the car, in time to have avoided the collision by the use of reasonable care on their part? Could the servant or servants of the defendant in charge of the electric car, by the use of reasonable care have seen that W was in a position of peril in time to have stopped the said car before the collision? Was W at and just before the time of the collision, using ordinary care and caution for his own safety? If you conclude

[12] Cincinnati, &c. R. Co. v. Howard, 124 Ind. 287, 24 N. E. 892.

[13] Cincinnati, I. & St. L. & C. R. Co. v. Howard, 124 Ind. 290, 24 N. E. 892. See Kimball v. Friend's Adm'r, 95 Va. 126, 27 S. E. 901.

[14] North Chicago, &c. R. Co. v. Penser, 190 Ill. 67, 72, 60 N. E. 78.

that the greater weight of the evidence does not show that W was using such care and caution for his own safety you need not concern yourselves with the other issues, because in no event can the plaintiff be entitled to recover a verdict unless it has been shown by the greater weight of the evidence that such care and caution was used by W. If you do find from the greater weight of the evidence that such care and caution was used by W, you will examine the evidence bearing upon the other issues, and if you do not find the greater weight of the evidence, taken as a whole, will warrant you in answering one or more of them in the affirmative, you should find the defendant not guilty.[15]

(6) If the jury believe from the evidence that ordinary care on the part of the deceased, for his own safety required him, before driving to or upon the track parallel with the track upon which he had been driving, at the time and place in question and under all the circumstances in evidence, to look and ascertain whether or not a car was approaching along the north bound track, and not to drive upon said track without so looking, and if the jury believe from the evidence that W, if he had looked, could by the exercise of ordinary care have ascertained whether or not a car was approaching along the said north-bound track, and if the jury further believe from the evidence that W did not so look and ascertain whether or not the car was so approaching and that he was injured in consequence and because of his failure, if he did so fail to look and ascertain, then the jury should find the defendant not guilty.[16]

(7) It was the duty of the said R to have exercised such a degree of care and prudence in crossing said tracks, and in looking and listening, as an ordinarily careful and prudent boy of like age and intelligence would have exercised under like circumstances. And if you believe from the evidence that the said R failed to exercise such a degree of care and prudence in going on or crossing the tracks, then you should find that he was guilty of negligence.[17]

(8) Where a railway company maintains an electric gong at its crossing as a precaution to protect persons crossing, the traveler is

[15] Chicago C. R. Co. v. O'Donnell 208 Ill. 276.

[16] Chicago C. R. Co. v. O'Donnell, 208 Ill. 275.

[17] Ruschenberg v. Southern Elec. R. Co. 161 Mo. 86, 61 S. W. 626.

not bound to exercise so high a degree of care as he would except for such precautions on the part of the company, still he is, nevertheless, bound to use his senses and do all which a prudent man, under the circumstances would do to avoid the danger.[18]

§ 630. **Care of the defendant in running trains.** (1) It was the duty of the defendant's employees, who were controlling the engine and train of cars on the morning of October 19, 1892, to have exercised ordinary care and diligence in keeping a lookout to avoid injuries of the said F and to warn him of approaching danger, as well as to have exercised great care and diligence in avoiding the injury to him after having seen him in danger.[19]

(2) If the jury find from the evidence that the defendant was at the time of the happening of the alleged injury, of which the plaintiff complains, the owner of a railroad with several tracks running through the city of C and across the streets thereof, and was engaged in moving trains propelled by steam thereon, then, in the management of said trains, the defendant was bound to use such care and caution to prevent injury to persons traveling along said streets, where they are crossed by said tracks, as prudent and discreet persons would have used and exercised under like circumstances; and if they find that on the night of the twenty-seventh of July, 1879, the plaintiff, while crossing the railroad of the defendant on W street, in said city, was run over by the cars of the defendant and injured, as stated in the testimony, and that such injury was caused by the negligence of the defendant or its agents in charge of said cars, and that, by the exercise of ordinary care and caution by the defendant or its agents, the accident causing such injury could have been avoided, the plaintiff is entitled to recover, if the jury further find that the plaintiff was, at the time of the accident, using due care and caution on his part.[20]

(3) The degree of care to be exercised by a railroad company must necessarily depend upon the location of the track and the circumstances of the case. In a place not frequented by the public, either by right or permission, expressed or implied, of the

[18] Kimball v. Friend, 95 Va. 130, 27 S. E. 901.

[19] Baltimore & O. R. Co. v. Few's Ex'r, 94 Va. 83, 26 S. E. 406.

[20] Baltimore & O. R. Co. v. Kean 65 Md. 396, 5 Atl. 325.

company, and in locations where the people are not constantly passing about, and where they cannot reasonably be expected to be, persons in charge of a train are not required by law to be on the lookout for them. In such cases, the company is entitled to the exclusive use of the tracks, and the persons in charge of the train are only required to avoid injury to them, if they can do so upon becoming aware of their peril. But when the place is within the city limits, in the yard of a company, or yard used by several companies together, or with tracks in close proximity to each other, and employees of companies whose tracks are in close proximity are engaged in the discharge of their duties, the safety of human life requires a different rule; and in this case, if you find that deceased was an employee of one of said roads, in the line of his duty; and the employees of defendant were not on the lookout for such persons, and had their engine in possession or under the control of an incompetent person, if it was, and running at a dangerous and unlawful rate of speed, if it was, and the injury was inflicted by reason of the want of proper care on the part of the defendant, if it was, the defendant would be guilty of negligence.[21]

(4) If the jury believe from the evidence, and from a view of the place where the accident is alleged to have taken place, that the view of an approaching train was obstructed by an embankment or otherwise, and that ordinary care would have required other precautions than those employed, and that the defendants did not use such other precautions, then they must conclude that the defendants were guilty of negligence; and if they believe further from the evidence that F, the plaintiff, did not know that the engine was nearing the crossing, so as to endanger his passing over it, but acted as an ordinarily prudent man would act under the circumstances, they must find for the plaintiff such damages as are proper, not exceeding the amount claimed in the declaration.[22]

(5) It was the duty of the defendants servants in the running and handling of the said east-bound engine and train of cars, to have exercised that degree of care and prudence which an ordinarily careful and prudent person engaged in like

[21] McMarshall v. Chicago, &c. R. Co. 80 Iowa, 759, 45 N. W. 1065.

[22] Kimball v. Friend, 95 Va. 129, 27 S. E. 901.

business, would have exercised under like circumstances; and a failure to exercise such a degree of care and prudence would render the defendant guilty of negligence in that respect.[23]

(6) If you find that the defendant, for an unreasonable and unnecessary length of time, kept and maintained its crossing of the highway in an unsafe condition, then it was bound, in operating its railroad, to exercise proper care to prevent the injury of a person placed in danger by that wrong, in his lawful use of the highway.[24]

(7) It was the duty of the defendant to construct and maintain its tracks in the street in such a way as to be reasonably safe to travel thereon by means of a buggy or other vehicle drawn by the ordinary horse having the ordinary disposition, allowing for the ordinary incidents of caprice or fright, and driven by an ordinarily careful and prudent person.[25]

(8) You are to consider that the necessity of running railroad cars with regularity and uniformity is not a matter of convenience merely. The business cannot be done at all, unless calculations are made upon the movements of trains. The risks attending upon a disturbance of that regularity are risks of human life, and not mere business delays. It would be in the highest degree dangerous to make the movements of the cars vary with the wind and weather.[26]

(9) The engineer and fireman in managing the train are at liberty, and it is their duty to run their train as nearly on time as possible; and in case of a way freight, whose length of stops at the stations is necessarily irregular, they are not to be considered negligent by their use of natural and reasonable means to make time.[27]

(10) The defendant railway had the right to run its trains over its road at any hour of the day or night, and the fact that the train in question was an extra train, or not running on schedule time, could not constitute negligence.[28]

[23] Schmitt v. Missouri Pac. R. Co. 20 Am. & Eng. R. Cas. 219.

[24] Lake S. & M. S. R. Co. v. McIntosh, 140 Ind. 271, 38 N. E. 476.

[25] Gray v. Washington W. P. Co. 30 Wash. 665, 71 Pac. 207.

[26] Hagan v. Chicago, D. & C. G. T. J. R. Co. 86 Mich. 624, 49 N. W. 509.

[27] Hagan v. Chicago, &c. R. Co. 86 Mich. 624, 49 N. W. 509.

[28] Graybill v. Chicago, &c. R. Co. 112 Iowa, 743, 84 N. W. 946.

§ 631. Great care required of defendant in running trains. (1) If the season at which the fire occurred was unusually dry, the railroad company, defendant, was bound by law to take extra precautions against fire; and if it did not do so, this fact may be considered in determining the question of negligence.[29]

(2) A railroad company, running and operating its trains on the streets of a city, must use greater care and diligence to prevent injuries to persons and property, than is required of them in running and operating their trains in less frequented and populous localities; and so, in certain localities in the town, greater precautions may be necessary than in others; for example, if the train is being carried around a corner, objects or persons on the other side of which are hidden from view, it is required of them to resort to special precautions, depending upon the particular locality and the circumstances to avoid accidents, and any neglect of such precautions as are proper, under the peculiar surroundings and circumstances of the locality, constitutes negligence, for which the railroad company is liable in damages, unless the plaintiff's intestate, by the exercise of ordinary care on his part, could have prevented the accident; and courts do not hold a person who is faced with a sudden danger to the same degree of judgment and presence of mind as would otherwise be required of him; and the burden of proof is on the railroad company to prove such absence of ordinary care on the part of the plaintiff's intestate.[30]

(3) A railroad company, operating its trains on the thoroughfare of a village, must use greater care than in less frequented localities; and any neglect of any precautions proper in the peculiar circumstances of the locality, constitutes negligence.[31]

(4) If the jury believe from the evidence that the approach to the crossing where F as killed was extra dangerous, then it was the duty of the defendant to use extra care to prevent accidents to travelers, and to use reasonable precautions to warn and protect travelers against approaching trains, the degree of care required

[29] Pittsburg, C. & St. L. R. Co. v. Noel, 77 Ind. 116. Held proper in the absence of a request for more specific instruction.

[30] Kimball v. Friend, 95 Va. 127, 27 S. E. 901; Cleveland, &c. R. Co. v. Miles, 162 Ind. 646. But see Indianapolis Street R. Co. v. Taylor (Ind.), 72 N. E. — (Decided Jan. 3, 1905.)

[31] Florida, C. & P. R. Co. v. Foxworth, 41 Fla. 8, 25 So. 338. See Note 30.

of the defendants, as well as the plaintiff, being measured by the dangerous character of the crossing. And, as to whether such reasonable precautions were used or adopted by defendants, is a question for the jury to determine.[32]

(5) You will recollect that this railroad was on the public street, and prima facie all persons have a right to be on the street for all lawful purposes; and the fact that this is a public street and that all persons, old and young, adults and infants, have a right to be on the same, ought to impose upon the driver and conductor of a street car vigilance in looking out for dangers and guarding against accidents and injuries to persons and things.[33]

§ 632. **Contributory negligence defined.**—(1) Contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and if the jury find, from a preponderance of all the evidence in the case, that the plaintiff was guilty of any negligence that helped to bring about or produce the injuries complained of, then, and in that case, the plaintiff cannot recover.[34]

(2) The basis of this action is "negligence," which is defined by the law to be the omitting to do something that a reasonably prudent person would do, or the doing of something that such person would not do. Under the circumstances of this case, and as applied to the case, if you find from the evidence that the defendant, by its employés, has omitted to do something that a reasonably prudent person would do or has done something that such person would not do, you would be warranted in finding that the defendant is guilty of negligence; and if you find that H or W or the driver of the vehicle in question, has done something, or omitted to do something which directly contributed to the collision and injury, then you will be warranted in finding such person or persons guilty of contributory negligence.[35]

(3) Contributory negligence is the failure to use that ordinary care and diligence that would be expected of an ordinarily prudent person under like circumstances to avoid injury. Thus, even

[32] Kimball v. Friend, 95 Va. 128, 27 S. E. 901.

[33] Etherington v. Prospect, &c. R. Co. 88 N. Y. 642.

[34] Baltimore & O. S. R. Co. v. Young, 153 Ind. 170, 54 N. E. 791.

[35] Hart v. Cedar Rapids, &c. R. Co. 109 Iowa, 637, 80 N. W. 662.

though you may find that the defendant was negligent, still, if you further believe from the evidence that the plaintiff B did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of an ordinarily prudent person, situated as he was, you should find for the defendant.[36]

(4) Contributory negligence is such negligence on the part of the plaintiff as helped to produce the injuries complained of, and if the jury find from a preponderance of the evidence in the case, that the plaintiff was guiltyof any negligence that helped to bring about or produce the injuries complained of, then, in that case, the plaintiff cannot recover. To state the matter in other words, contributory negligence is the failure to use that ordinary care and diligence that would be expected of an ordinarily prudent person under like circumstances to avoid injury. Thus, even though you may find that the defendant was negligent, still, if you further believe from the evidence that the plaintiff did not exercise that ordinary care and diligence to prevent injury to himself that would be expected of an ordinarily prudent person, situated as he was, you should find for the defendant.[37]

§ **633. Burden of proof as to contributory negligence.**—(1) The burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff canot recover.[38]

(2) When a person crossing a railroad track is injured by collision with a train, the fault is prima facie his own, and he must show affirmatively that his fault or negligence did not contribute to the injury before he is entitled to recover for such injury.[39]

(3) To entitle the plaintiff to recover under either the first or

[36] Galveston, H. & S. R. Co. v. Bonnett (Tex. Cv. App.), 38 S. W. 813.

[37] Baltimore & O. S. R. Co. v. Young, 153 Ind. 170, 54 N. E. 791; Galveston, H. & S. R. Co. v. Bennett (Tex. Cv. App.), 38 S. W. 813.

[38] Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 287, 24 N. E. 892.

[39] Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 284, 24 N. E. 892. This is no longer the law in Indiana, the rule as to burden of proof having been changed by statute, Southern Indiana R. Co. v. Peyton, 157 Ind. 690, 61 N. E. 722.

third paragraphs of the complaint it must appear from a fair preponderance of the evidence not only that the injuries complained of were caused by the negligent acts or some of the negligent acts of the agents, servants or employés of the defendant, but that he was himself free from all negligence contributing directly to said injuries.[40]

(4) The plaintiff must show that the negligence of the defendant, or its employés, caused the injury complained of, and that the plaintiff in no way directly contributed to the injury.[41]

(5) A traveler approaching a railroad crossing must look and listen; that it is not sufficient to look in one direction, but that he is under the duty to look in directions from which engines and cars may approach, and that it is his duty to exercise a higher degree of care where the crossing is dangerous, than where it is not, and that if you believe from the evidence that the plaintiff's intestate in this case could have seen the engine, with which he collided, approaching, by looking, and so have avoided the collision, the presumption is that he did not look, or, if he did look, did not heed what he saw; and the burden of proof in such case is upon the plaintiff to show that he did look and listen; and if the jury believe from the evidence that he omitted to look and listen, they must find a verdict for the defendant receivers, unless they further believe that, after perceiving the negligence of the plaintiff's intestate, they could have avoided the effect of such negligence by the exercise of ordinary care.[42]

(6) The burden of proof is on the plaintiff to show by a preponderance of the evidence that he vigilantly used his eyes and ears to ascertain if a train of cars was approaching, and if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover. And the plaintiff must also prove by a preponderance of the evidence that the negligence of the defendant or its servants or employés caused the injury

[40] Chicago, St. P. & R. Co. v. Spilker, 134 Ind. 401, 33 N. E. 280, 34 N. E. 218. See note 39.

[41] Locke v. S. C. & P. R. Co. 46 Iowa, 113. See Note 39.

[42] Kimball v. Friend, 95 Va. 131, 27 S. E. 901. The rule as to burden of proof has been changed in Indiana. See note 30.

complained of, and that he, the plaintiff, in no way directly contributed to the injury.[43]

§ **634. Plaintiff's contributory negligence.**—(1) To entitle the plaintiff to recover in this action, the jury must find from the evidence that the accident or injury complained of was caused altogether and entirely by the negligence and want of due care by the defendant or its servants and employés, and that the plaintiff did not directly contribute to the said accident by negligence or by want of prudence and ordinary care on her part.[44]

(2) One who is injured by the mere negligence of another cannot recover any compensation for his injury, if he, by his own ordinary negligence or willful wrong, contributed to produce the injury of which he complains; so that, but for his concurring and co-operating fault, the injury would not have happened to him, except when the direct cause of the injury is the omission of the other party, after becoming aware of the injured party's negligence to use a proper degree of care to avoid the consequences of such negligence.[45]

(3) Ordinary prudence and common sense suggest to every one who is aware of the character and operation of electric street cars that it is dangerous to pass in front of them at a short distance while in motion, and one who does so without looking and listening, when, if he had looked and listened, he could have discovered the car, is guilty of contributory negligence, and cannot recover; and if you find that had the plaintiff looked and listened he could have discovered the car, and thus have avoided the accident and injury, and that he failed to do so, your verdict must be for the defendant.[46]

(4) If the plaintiff thought that he had time to cross the track of the defendant—if he was attempting to cross the track—before the car of the defendant would reach him, and did not have sufficient time to do so, then it was error in judgment on the

[43] Cincinnati, I. St. L. & C. R. Co. v. Howard, 124 Ind. 287, 24 N. E. 892; Locke v. S. C. & P. R. Co. 46 Iowa, 113; Baltimore & O. R. Co. v. Owings, 65 Md. 505, 5 Atl. 329; Cooper v. Central R. Co. 44 Iowa, 138. The rule as to burden of proof has been changed in Indiana. See note 39.

[44] Baltimore & O. R. Co. v. Owings, 65 Md. 505, 5 Atl. 329.

[45] Cooper v. Central R. Co. 44 Iowa, 138.

[46] Traver v. Spokane St. R. Co. 25 Wash. 244, 65 Pac. 284; Union Traction Co. v. Vandercook, 32 Ind. App. 621.

part of plaintiff, and he cannot recover, and your verdict should be for the defendant.[47]

(5) The defendant company, at the place where the accident happened and the collision occurred, had the preference and the superior right to the use of the track; and that it was the duty of the plaintiff not to obstruct the use of said track or the operation of the cars thereon; and it was his duty to turn out to allow such street car to pass, if he was driving upon the track; and it was his duty to remain off the track, and not attempt to cross the same in front of a moving car, except at a safe distance therefrom; and a failure in either of these respects constitutes contributory negligence and defeats recovery, and entitles defendant to a verdict.[48]

(6) If plaintiff was guilty of any act of negligence which directly contributed to his injury, or was guilty of any lack of ordinary care on his part, whether the act be an active one or an omission to do what he ought to have done under the circumstances, and such lack of care, act or omission contributed to the accident, and without which the accident would not have occurred, then you cannot go further and apportion the accident or injury, but the plaintiff's contributory negligence in such case defeats recovery, and your verdict must be for the defendant.[49]

(7) Notwithstanding you should find that the defendant was guilty of negligence in the operation of its car, yet, if you further find that the accident or the injury to the plaintiff would not have happened, except for the negligence or failure to use ordinary care unon the part of the plaintiff, then your verdict must be for the defendant.[50]

(8) Before you can find for the plaintiff, therefore, you must find the defendant to have been guilty of negligence as alleged in the complaint. Another principle of law proper to be mentioned in this connection is, that if the plaintiff was himself guilty of negligence which materially contributed to the injury complained of, he cannot recover.[51]

[47] Traver v. Spokane St. R. Co. 25 Wash. 244, 25 Pac. 284.

[48] Traver v. Spokane St. R. Co. 25 Wash. 243, 25 Pac. 284.

[49] Traver v. Spokane St. R. Co. 25 Wash. 243, 25 Pac. 284.

[50] Traver v. Spokane St. R. Co. 25 Wash. 243, 25 Pac. 284.

[51] Traver v. Spokane St. R. Co. 25 Wash. 239, 25 Pac. 284.

§ 635. **Contributory negligence of deceased.**—(1) This case presents three questions of fact, among others, for the consideration of the jury: First was the death of A caused by injuries received by her on the fifth day of August, 1891, and brought about by the locomotive and cars of the defendant coming in collision with the vehicle in which the deceased was riding on said day as alleged in the complaint? second, were such injuries to said deceased produced by the negligence of the defendant, its servants or employés? third, did the negligence of the deceased woman contribute to such injuries and death?[52]

(2) If the train was backing under the shed without displaying the light from the front end of the leading car and without having a flagman stationed thereon, and was backing without due care, and the intestate knew it and placed himself in a position of danger, his negligence was the proximate cause of the injury,—he had the last chance to avoid the injury,—and this being so, he, and not the defendant, would be responsible for his death. On the contrary, if plaintiff was standing on or near the track, he was not called upon to look out for a backing train which displayed no light and had no flagman, if you should so find, on the front of the leading car, for it was the duty of the defendant, as before explained, to display the light and have a flagman at his post, he not being bound to expect a violation of duty. If, therefore, plaintiff was standing on or near the track, and the defendant backed its train under the shed without the light on the front end of the leading car, or in a conspicuous place thereon, or without a flagman thereon, and if the jury should further find that P did not discover the train in time to escape, then the defendant was negligent and, such negligence was the cause of the injury.[53]

(3) If the deceased was hard of hearing and walked on the defendant's track without looking back, or having looked back, still continued to walk on the track, such conduct on his part was gross negligence, and makes out a case of contributory negligence against him which will defeat all rights of recovery in this action unless it is made to appear to the satisfaction of the jury that at

[52] Lake S. & M. S. R. Co. v. McIntosh, 140 Ind. 263, 38 N. E. 476; Indianapolis, &c. R. Co. v. Stout, 53 Ind. 143.

[53] Purnell v. Raleigh & I. R. Co. 122 N. Car. 839, 29 S. E. 953.

and about the time of the near approach of the train, he used the diligence and care necessary to extricate himself from the peril in which he had placed himself by his own voluntary act.[54]

(4) The defendant's servants in charge of the engine which struck the deceased had the right to assume that he was rational, and would exercise care and caution and keep himself out of danger until they saw something in his conduct which would be inconsistent with such assumption. If he was walking on a line parallel with the track, and so far removed therefrom as to be free from danger of collision, they had the right to assume that he would remain at such safe distance, until he manifested a purpose to place himself in dangerous proximity to it.[55]

(5) If the jury believe from the evidence that L the husband of the plaintiff, was guilty of any negligence which contributed to the injury resulting in his death, then the jury must find a verdict for the defendant, although they may further believe that the plaintiff's husband was killed by the negligence of the defendant as charged in the petition.[56]

(6) If the jury believe from the evidence, that the deceased, might, in the exercise of ordinary care, have seen the danger, and avoided it, and that he did not do so, and that the omission of the deceased to do so contributed to the result, then he was guilty of such negligence as will prevent a recovery, unless the injury was produced by willful or intentional acts of the defendant or its agents.[57]

(7) If the jury believe from the evidence that the injury and death of plaintiff's intestate was due to the failure of deceased to look back while on the track, and the failure of the servants of defendant to keep a proper lookout ahead, and that both these causes combined caused the death of plaintiff's intestate, then it is the duty of the jury to find a verdict for the defendant.[58]

§ 636. **Both parties guilty of negligence.**—(1) If you believe, from the evidence in this case, that both the plaintiff and the

[54] Frazer v. South & N. A. R. Co. 81 Ala. 190, 1 So. 85.

[55] Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 429.

[56] Le May v. Missouri Pac. R. Co. 105 Mo. 370, 16 S. W. 1049.

[57] Illinois Cent. R. Co. v. Goddard, 72 Ill. 569.

[58] Frazer v. South & N. A. R. Co. 81 Ala. 190, 1 So. 85.

agents and servants of the defendant were guilty of gross negligence contributing to the injury complained of in this case, then your verdict should be for the defendant.[59]

(2) If the injuries complained of were the joint result of plaintiff's carelessness and lack of vigilance for his own safety, and of the failure of defendant's servants in charge of said train to give signals of approach to said crossing, then the verdict must be for the defendant. If both parties were careless, neither can recover from the other on account thereof.[60]

(3) If the injuries complained of were the joint result of the plaintiff's carelessness and lack of vigilance for his own safety, and of the failure of the defendant's servants in charge of the train to give signals of approach to the crossing in question, then the plaintiff cannot recover, If you believe from the evidence in this case that both the plaintiff and defendant's agents or servants were guilty of negligence contributing to the injury complained of, then your verdict should be for the defendant.[61]

(4) It is the duty of a traveler approaching a crossing on grade over a railroad track to look and listen, and for this purpose it is his duty to stop before crossing the track, if the circumstances are such as to make it necessary to stop in order to properly look and listen; and if the jury believe from the evidence that the plaintiff's intestate was killed by the engine of defendant while attempting to cross the track of said company, and that at the time he was so killed he was riding upon a bicycle, and that he approached the crossing over said tracks through a cut which obstructs the view of the track until the plaintiff got within a reasonably short distance of the track; and that the plaintiff could not, without stopping his bicycle before reaching the crossing, look carefully up and down the track, and if they believe from the evidence that the plaintiff's intestate did not stop when in view of the track and listen and look in both directions, then the jury are instructed that he was guilty of contributory negligence, and cannot recover in this action, though the jury may

[59] Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 150, 22 N. E. 15.

[60] Kennedy v. Hannibal & St. J. R. Co. 105 Mo. 273, 15 S. W. 983, 16 S. W. 837.

[61] Kennedy v. Hannibal & St. J. R. Co. 105 Mo. 273, 15 S. W. 983, 16 S. W. 837; Chicago & N. W. R. Co. v. Dunleavy, 129 Ill. 150, 22 N. E. 15.

believe that the defendant may have, also, been guilty of negligence.[62]

(5) The presence of railroad tracks is a proclamation of danger to any one attempting to cross them, and that it is not only the duty of the person about to cross railroad tracks to vigilantly use his eyes and ears and to look in every direction, and to listen to make sure that the crossing is safe, and that this duty is not performed by plaintiff's looking from a point where the view is obstructed, but the duty is a continuous one, and must be performed at any point, and if the plaintiff fails to perform this duty, and by performing it might have seen the danger in time to avoid it, such failure is contributory negligence on the plaintiff's part, and she cannot recover, notwithstanding the jury may believe from the evidence that the defendant is also guilty of negligence, unless the defendant's agents might, after perceiving the negligence of the plaintiff, have stopped the engine in time to avert the accident.[63]

(6) It is not sufficient to enable the plaintiff to recover, if it appears that he stopped at a distance of two hundred feet from the crossing, and being then unable, on account of a snow squall, to see the train which he had heard whistle, started his horses and drove at a trot onto the track, without again looking for the train. If, under such circumstances, he drove onto the track and injury ensued, he was guilty of contributory negligence and cannot recover, even though the jury find that the defendant was also negligent in not giving proper signals for the crossing.[64]

§ **637. The plaintiff not a trespasser.**—(1) If you shall find that the defendant company and another company were each rightfully in the joint use and occupation of the transfer track, and the father of the plaintiff then in the employment of the other company, duly authorized, was engaged in repairing a car upon the track; that the plaintiff brought to him his dinner, and that while engaged in repairing said car, shortly thereafter, the father requested the plaintiff child to render him

[62] Kimball v. Friend, 95 Va. 132, 27 S. E. 901.

[63] Atlantic & D. R. Co. v. Ironmonger, 95 Va. 628, 29 S. E. 319. See, Chicago, &c. R. Co. v. Hatch, 79 Ill. 137.

[64] Grand T. R. Co. v. Cobleigh, 78 Fed. 786.

necessary temporary assistance to enable him, the said father, to perform the work of repairing the car, if he was thus authorized to employ the plaintiff, then the plaintiff was rightfully upon the track.[65]

(2) The jury are the triers of the fact as to whether or not D was a licensee on the defendant's right of way. If the jury believe from the evidence that the deceased D, when he received his injuries was traveling along the foot path or way over defendant's land, which had been long used as a walkway leading to a crossing over defendant's track by himself and certain other individuals, occupants of an adjoining lot or close, or by the general public, with the knowledge of the defendant company and without any objection on its part, then the jury must find that said D was not a trespasser while traveling said path, but that he was a licensee and not wrongfully traveling said path.[66]

(3) If the jury believe from the evidence that the plaintiff's husband and others were in the habit of using the track of defendant's railway next to the M river, and on which plaintiff's husband was at the time he was killed, in towing said boat up the river, and had been in the habit of doing so, continually, for a long time prior to the day in question, without objection or protest on the part of defendant or under such circumstances, when by the exercise of ordinary care it might have been known that they were using said track; and that from the nature of the ground rising between said track and the M river, there was no other place where those towing boats up the river could reasonably be expected to go, then the court instructs the jury that the plaintiff was not a trespasser in being upon said track at the time he was run against and killed.[67]

(4) Although the defendant varied from the usual manner of using the track in question, yet if the plaintiff was not there as an employé of the company, but was there wrongfully, he cannot complain of the negligence of the company, unless the defendant's agents knew that he was there, and willfully injured him.[68]

[65] Pennsylvania Co. v. Gallagher, 40 Ohio St. 637.

[66] Norfolk & W. R. Co. v. De Board, 91 Va. 702, 22 S. E. 514.

[67] Le May v. Missouri, &c. R. Co. 105 Mo. 368, 16 S. W. 1049.

[68] Pennsylvania Co. v. Gallagher, 40 Ohio St. 637.

§ 638. Question of negligence submitted to the jury.—(1) It was the duty of the defendant's switching crew to exercise ordinary care in so doing their work as to avoid injuring the plaintiff while running his engine upon the defendant's track, and if the jury believe, from the evidence, the engine which struck and collided with plaintiff's engine at the crossing was not managed and controlled with ordinary care by the defendant's crew in charge of the same, and the plaintiff's injury was the direct result of the negligence of such crew in managing and controlling said colliding engine while he was in the exercise of ordinary care for his own safety, the defendant is liable and plaintiff is entitled to a verdict.[69]

(2) If the jury find that on or about the thirteenth day of August, 1884, the plaintiff was injured by the locomotive or cars of the defendant while operated by its agents on its road and that such injury resulted directly from the want of ordinary care and prudence of the agents of the defendant and not from the want of ordinary care and prudence on the part of the plaintiff directly contributing to the injury, then the plaintiff is entitled to recover.[70]

(3) If the jury believe from the evidence that the plaintiff while in the exercise of ordinary care was injured by or in consequence of the negligence of the defendant, as charged in the declaration or either one of the counts thereof, then you should find the defendant guilty.[71]

(4) If in this case the jury believe, from the evidence that the plaintiff, while using such reasonable care for his own safety, was injured in the manner as charged in the declaration and that such injury was occasioned by the negligence of the defendant or of its agents in charge of the train of cars mentioned in the evidence, and as charged in the declaration, then the jury should find the defendant guilty.[72]

(5) If the plaintiff did not receive the injuries complained of, by any contributory act of negligence or fault of her own, but was injured at the time complained of by the carelessness and negligence or fault of the defendant's servants, or one of them,

[69] St. Louis N. S. Yards v. Godfrey, 198 Ill. 295, 65 N. E. 90.

[70] Philadelphia, W. & B. R. Co. v. Hogeland, 66 Md. 150, 7 Atl. 105.

[71] Chicago & A. R. Co. v. Fisher, 141 Ill. 624, 31 N. E. 406.

[72] Chicago & A. R. Co. v. Gore, 202 Ill. 188, 66 N. E. 1063. Held not assuming negligence.

committed in the general scope of employment as such servant or servants the defendant is liable for such damages as she may have sustained by the injuries thus received.[73]

§ 639. Question of contributory negligence for jury.—(1) If you should believe that the plaintiff might have avoided the accident by driving directly across the track instead of undertaking to turn, he would not necessarily be guilty of contributory negligence in that respect, provided you find that an ordinarily careful and prudent man, under the excitement and particular circumstances surrounding the plaintiff at the time, might have adopted the course pursued by him. His conduct in that regard is not necessarily to be judged by the facts as they now appear before the jury, as the same are subjected to the cool, calm consideration that you will be able to give them in the light of all the facts and circumstances as they are now made to appear, but he is entitled to have them considered as they appeared to him at the time; and, if an ordinarily careful and prudent man might have acted as the plaintiff acted, with his view of the circumstances as they then appeared to him, you will be justified in finding that he was not guilty of contributory negligence by turning back, rather than by going directly across the track.[74]

(2) If the jury find from the evidence that the car was running at a moderate rate of speed, and that the bell or gong had been sounded, and that the plaintiff suddenly and without warning, and under circumstances which were not reasonably to be expected, drove upon or attempted to cross the track of the defendant in close proximity to the car of the defendant, and at a time when it was not prudent to do so; then, and in that event, the plaintiff would not be exercising ordinary care and prudence.[75]

(3) If you shall find that the defendant was operating its car at a high rate of speed, yet, if you shall further find that the plaintiff T, by his negligence and want of ordinary care contributed to the accident in any appreciable degree, your finding must be for the defendant.[76]

[73] Louisville N. A. & C. R. Co. v. Wood, 113 Ind. 562, 14 N. E. 572, 16 N. E. 197.

[74] Traver v. Spokane St. R. Co. 25 Wash. 241, 65 Pac. 284.

[75] Traver v. Spokane St. R. Co. 25 Wash. 242, 68 Pac. 284.

[76] Traver v. Spokane St. R. Co. 25 Wash. 242, 68 Pac. 284.

(4) If the jury find from the evidence in this case that the accident complained of was in any degree owing to the want of due care and caution on the part of the plaintiff, directly contributing to said accident, then their verdict must be for defendant.[77]

(5) If the jury find from the evidence that the accident complained of was caused by the want of ordinary care on the part of the defendant in the running of its cars, and shall also find that the want of ordinary care and prudence on the part of the plaintiff, directly contributed thereto, then the plaintiffs are not entitled to recover.[78]

(6) If you find from all the evidence before you that the accident complained of was in any degree owing to the want of due care and caution, that is, ordinary care and prudence, on the part of the plaintiff, directly contributing thereto, then the plaintiff cannot recover and your verdict must be for the defendant.[79]

(7) If you find from the evidence that the plaintiff, knowing the position of the railroad track and that trains were running frequently thereon, approached the crossing, without looking in the direction from which the train was coming—and without stopping his team to listen for an approaching train—so quickly that he was unable to stop his horses before going upon the track, and in consequence thereof the collision occurred, the plaintiff cannot recover in this action.[80]

(8) If the jury believe from the evidence that the plaintiff was well acquainted with the crossing and the road leading thereto, and further believe that at the point twenty-six feet from the crossing he could have have stopped his team, and from that point, if he had looked, could have seen the train approaching, and thus have averted the accident, the verdict must be for defendant.[81]

(9) It was the duty of plaintiff, while approaching said railroad track and before driving upon the same, to use his eyes and ears, to look and listen for an approaching train; and if the jury believe from the evidence that the plaintiff, if he had so looked and listened, could have thereby seen or heard the train in time to have avoided collision with it and and the injuries complained

[77] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 521, 20 Atl. 2.

[78] Baltimore & O. R. Co. v. Owings, 65 Md. 505, 5 Atl. 329.

[79] Philadelphia, W. & B. R. Co. v. Anderson, 72 Md. 521, 20 Atl. 2; Baltimore & O. R. Co. v. Owings, 65 Md. 505, 5 Atl. 329.

[80] Haines v. Illinois Cent. R. Co. 41 Iowa, 231.

[81] Kennedy v. Hannibal & St. J. R. Co. 105 Mo. 274, 15 S. W. 983, 16 S. W. 837.

of, then your verdict must be for the defendant, notwithstanding the jury may further believe from the evidence that defendant's servants failed to give signals by bell or whistle of the train's approach.[82]

(10) If by reason of any miscalculation of the plaintiff as to the proximity of a train, he concluded to drive upon the crossing without further efforts to ascertain certainly whether he could safely do so, the verdict must be for the defendant.[83]

(11) If the jury believe from the evidence that the ladders on freight cars are placed there for the use of the brakemen, in the discharge of their duties, then it was the duty of the plaintiff to have noticed any visible defect in the ladder and to have reported it to the company; and, therefore, if the jury believe from the evidence, that there was a defect in the round of the ladder and that it was a visible defect, and if the jury further believe from the evidence that the plaintiff did not report the defect to the company, then the plaintiff cannot recover on account of such defect.[84]

(12) If the jury believe from the evidence that any element of danger connected with the defendant's trailer by which the plaintiff was injured was not a hidden or concealed danger, but was open to the observation and could be comprehended by a boy of average intelligence, of the age of the plaintiff; and if you further believe that the trailer, when left on the track by the defendant's employés the day of the accident, was held by brakes of the ordinary kind, and that the brakes were set in a manner to hold the cars where they were unless some one should loosen the brakes the plaintiff cannot recover.[85]

§ 640. **Speed of trains—Running at high rate.**—(1) If you shall find from the evidence that the defandant's servants in charge of the train that killed B, gave signals by whistling once and no more at such distance if it exceeded one hundred rods from —— street, that said B would naturally think that he could safely cross the track before the train arrived at said street,

[82] Kennedy v. Hannibal & St. J. R. Co. 105 Mo. 274, 15 S. W. 983, 16 S. W. 837.

[83] Kennedy v. Hannibal & St. J. R. Co. 105 Mo. 274, 15 S. W. 983, 16 S. W. 837.

[84] Toledo, &c. R. Co. v. Ingraham, 77 Ill. 313.

[85] George v. Los Angeles R. Co. 126 Cal. 357, 46 L. R. A. 829, 58 Pac. 819.

if he heard such whistle, and that he did hear it, and should further find that no bell was rung, and that said train was going at a greater rate of speed than men of ordinary care and prudence in like employment would have run it, under like circumstances and conditions, and that said B, as a reasonable man, was thereby deceived and led to believe that he could cross the tracks of the defendant's railroad in safety, and that if attempting under these circumstances to cross said tracks without fault or negligence on his part, he was, on account of carelessness upon the part of the servants of the defendant in operating said train at an unusual and dangerous rate of speed, struck and killed, then the plaintiff would be entitled to recover if such carelessness was the sole cause of his injuries.[86]

(2) If said train was being run by the employés of the defendant at a high and dangerous rate of speed, such speed being so high and dangerous as to become a negligent management of the train, and that such accident resulted in consequence thereof, then the jury will find the issues for the plaintiff.[87]

(3) The jury are instructed that railway companies are permitted by law to run their passenger trains at such high rate of speed as, under all the surrounding circumstances and conditions of track, etc., shall comport with the rule of law which requires them to exercise a high degree of care for the safety of passengers, and whether a given rate of speed is dangerous or not is to be determined by the surrounding circumstances, such as condition of the track, fencing of right of way, the management of the train, as shown by the evidence, and it must be such degree of danger as is not ordinarily incident to railway travel.[88]

(4) If the jury find from the evidence that the accident by which the plaintiff sustained the injuries complained of was the result of the fast running of the train, and that the train was so running against the orders of defendant's superior officers and against the regulations made in that respect by defendant, then

[86] Schweinfurth v. Cleveland, C. C. & St. L. R. Co. 60 Ohio St. 225, 54 N. E. 89.

[87] Indianapolis, B. & W. R. Co. v. Hall, 106 Ill. 371, 374. Held proper and not stating that a given high rate of speed for a passenger train was a dangerous and negligent rate, rendering the defendant liable.

[88] Indianapolis, B. & W. R. Co. v. Hall, 106 Ill. 371, 375.

in that event the plaintiff will not be entitled to recover more than his actual damages in this suit.[89]

(5) Though a railroad company and the public have equal rights at the intersection of the track of the former with a public highway, those operating a train upon the railroad are under no obligation to slacken the speed of such train, or to bring the same to a stop, when they notice a person crossing or about to cross the track at its intersection with the highway; but they may presume that such person will himself take all proper precautions to avoid injury.[90]

(6) If a person be seen upon the track of defendant's electric street railway, who is apparently capable of taking care of himself, the motorman may assume that such person will leave the track before the car reaches him; and this presumption may be indulged in so long as the danger of injuring him does not become imminent; and it is not necessary for a motorman to slacken the speed of the car until such danger becomes imminent.[91]

(7) If the plaintiff, T, was not in imminent peril at the time he drove upon the track or attempted to cross the track of the defendant, the motorman had a right to presume that he would pass on, over and off the track, out of the way; and the motorman was not guilty of negligence in failing to stop the car, in either of the events just mentioned, until the peril of the plaintiff became imminent.[92]

§ 641. **Failure to sound whistle or ring bell.**—(1) It was the duty of the engineer or those in charge of the train, on approaching a highway, to sound the whistle on the engine at least eighty rods before reaching said crossing, and if they failed to do so and an accident and injury occurred therefrom, this would be negligence on the part of said railway company; and if you believe from a preponderance of the evidence that the defendant by its employés running the train from which said accident occurred, failed to sound said whistle, and by reason of such failure said accident occurred without negligence on the part of

[89] Texas T. R. Co. v. Johnson, 75 Tex. 161, 12 S. W. 482.

[90] Ohio & M. R. Co. v. Walker, 113 Ind. 201, 15 N. E. 234.

[91] Traver v. Spokane St. R. Co. 25 Wash. 244, 65 Pac. 284.

[92] Traver v. Spokane St. R. Co. 25 Wash. 244, 65 Pac. 284.

the plaintiff, then in that case, you should find for the plaintiff.[92]

(2) If the jury believe from the evidence that the defendant started a train in the city of Peoria without ringing a bell or sounding a whistle, and if they further believe from the evidence, that Fred Clark was attempting to cross the defendant's track on which said train was started, and that by reason of there being no bell rung or whistle sounded, such train or car of that train struck him while so attempting to cross said track, then the defendant was guilty of culpable negligence; and if you further believe, from the evidence, that the death of said Clark was the result of such negligence on the part of the defendant, and that said Clark was not guilty of negligence contributing to the injury, then you should find the defendant guilty.[94]

(3) If you believe from the evidence that the agents or servants of the defendant in charge of the engine in question failed to ring a bell or sound a whistle, continuously, for a distance of eighty rods, before reaching the crossing, and that James Molohan and Mary Molohan, while attempting to pass over the railroad track at said crossing, were exercising due care and caution for their own safety, and were struck and killed at said crossing by an engine then in charge of such agents or servants, and that such killing was the direct consequence or result of the failure of said agents or servants to so ring a bell or sound a whistle, then the jury should find for the plaintiff.[95]

(4) If the jury believe from the evidence that F approached the crossing where he met his death, as an ordinarily prudent man would do, traveling as he was on a bicycle, and that the electric gong did not sound to warn him of the approaching engine when he was about to cross, and that if said electric gong had sounded, it would have warned him of the approaching engine in time to escape, and that no other sufficient warning

[93] Pittsburg, C. & St. L. R. Co. v. Martin, 82 Ind. 482. Statutory provisions exist requiring the bell to be rung or whistle to be blown as a warning of the approach of a train of cars at any crossing.

[94] Peoria & P. N. R. Co. v. Clayberg, 107 Ill. 644, 650. Held not singling out facts and not objectionable as to the word "culpable."

[95] McNulta v. Lockbridge, 137 Ill. 274, 27 N. E. 452.

of the approaching engine was given, and that the embankments were such as to prevent his seeing the engine in time to escape, and he lost his life thereby, and that he listened for the approach of the train, and failed to hear, they must find for the plaintiff.[96]

(5) The failure to ring the bell or give other warning of the approach of the train to the crossing, if such failure there was, does not in itself constitute negligence and entitle the plaintiff to recover; but such circumstances can only be considered by you in connection with others as tending to prove negligence on the part of the defendant company.[97]

(6) The statute requiring the bell to be rung, or the whistle to be blown at crossings, is intended for the protection of those passing over the track at such crossings, and not for those using the track elsewhere; and said statute is complied with, when either the bell is rung or the whistle blown.[98]

(7) It is made the duty, by law of railroad companies, to cause the bell on their trains to be rung and the steam whistle to be blown when approaching a public crossing. If in this case you find that the engineer or fireman complained of sounded the whistle or rang the bell, or did both as signals that the train was about to back toward a street or other public crossing, and said noise gave fright to the plaintiff's team and caused him to be injured, the fact that said noise frightened the team would not render defendant liable for the injury, unless such engineer or fireman saw and realized, or had to reason to know that such noise would cause fright to the team and result probably in injury.[99]

(8) The defendant railroad company is not bound to whistle or ring the engine bell when approaching a private or farm crossing; and, further, that said defendant railroad company may regulate the speed of trains approaching private crossings as it may desire by its own regulations; but, nevertheless, the jury are instructed that said defendant railroad company, knowing that said private crossings are likely to be used by persons

[96] Kimball v. Friend, 95 Va. 128, 27 S. E. 901.

[97] Geist v. Missouri Pac. R. Co. 62 Neb. 322, 87 N. W. 43.

[98] Davidson v. Pittsburg, C. C. St. R. Co. 41 W. Va. 415, 23 S. E. 593.

[99] Hargis v. St. Louis, A. & T. R. Co. 75 Tex. 20, 12 S. W. 953.

passing over and upon the railroad track, are bound, when approaching said crossings, to keep a proper lookout, and to use all reasonable precautions when approaching said private or farm crossing, to prevent injury to any one on or approaching said crossings.[100]

§ 642. **Wrongfully blowing whistle.**—(1) If the jury believe from the evidence that the plaintiff, on the day and at the place in question, and immediately before and at the time of the accident in question, was in the exercise of the care and caution for his own safety, which a reasonably prudent and careful man under the same circumstances, would have exercised; and if the jury further believe, from the evidence, that the engineer or fireman of the engine in question saw the plaintiff's position at the head of his team within thirty feet of the track over which said engine was then passing, and then negligently or wantonly caused the whistle of said engine to be sounded in a short, sharp, shrill and unusual manner, and the steam to escape from said engine in a reckless or negligent manner; and if the jury further believe, from the evidence, that the sounding of said whistle, as aforesaid, or escaping of said steam, as aforesaid, frightened the team of the plaintiff so that said team thereupon ran away and injured the plaintiff, then the plaintiff should recover.[101]

(2) If you believe from the evidence that plaintiff received physical injuries, such as are alleged in the petition, by reason of his team becoming frightened and throwing him to the ground or by dragging him, and you further find that said team became frightened by reason of the noise made by the employés of defendant in blowing the whistle or ringing the bell, or causing steam to escape from an engine of defendant in their charge; and you find from the evidence that said employé or employés of defendant caused such noise for the purpose and with the intention of frightening said team, or knowing or having reason to believe that such noise would frighten said team, then plaintiff would be entitled to recover such sum as actual damages as

[100] Morgan v. Wabash R. Co. 159 Mo. 271, 60 S. W. 195.

[101] Chicago, B. & Q. R. Co. v. Yorty, 158 Ill. 323, 42 N. E. 64.

the evidence may show him entitled to under the instructions hereinafter given.[102]

(3) If, however, you do not find that said employé or employés made said noise with the intent to frighten plaintiff's team, and you do not find that they knew or had reason to believe that said noise would frighten said team and probably cause injury to the plaintiff or others in said wagon, then you will find for defendant.[103]

(4) If you find from the evidence that plaintiff drove his team across the defendant's railroad at a public crossing, and that an engine of defendant was standing near such crossing, and you further find that plaintiff's team was afraid of such engine and became frightened in crossing in front of said engine; and after crossing said railroad plaintiff voluntarily stopped his team and wagon, and said team became quiet, and the engineer or other employé then blew the whistle and rang the bell as signals to move such engine, believing from plaintiff's act in stopping his team that no injury would arise from such signals or necessary escaping steam, and plaintiff's team took fright and injured him, then defendant would not be liable.[104]

§ **643. Flagman at crossing—Necessity.**—(1) There was no absolute duty imposed by law on the defendant to maintain either gates or a flagman at the crossing in question, and if you believe, from the evidence, that there were no gates or flagman there at the time of the alleged injury, that is not of itself evidence of negligence on the part of the defendant. The plaintiff does not allege or claim any negligence on the part of the defendant in regard to this. Evidence as to whether there were gates or a flagman at the crossing in question at the time of the alleged injury was admitted by the court, and should be considered by the jury, not as tending, of itself, to establish negligence, but solely for the purpose of showing the general condition of things at the locality of said crossing at the time of the alleged injury, so as to assist the jury to determine, from all the evidence and circumstances in the case, and under the

[102] Hargis v. St. Louis, A. & T. R. Co. 75 Tex. 20 12 S. W. 953. See also, Indianapolis Union R. Co. v. Boettcher, 131 Ind. 82, 28 N. E. 551.

[103] Hargis v. St. Louis, A. & T. R. Co. 75 Tex. 20, 12 S. W. 953.

[104] Hargis v. St. Louis, A. & T. R. Co. 75 Tex. 21, 12 S. W. 953.

instructions of the court, whether the defendant was guilty of negligence, as charged in the plaintiff's declaration.[105]

(2) The defendant was not required by law to station a flagman at the road crossing, near which the accident complained of is testified to have occurred; and the jury cannot infer negligence on the part of the defendant, because the defendant did not keep a watchman or flagman at or near said crossing, or because said defendant did not have any person at or near the place of said accident, to warn persons of danger in attempting to cross the railroad track at that place, or to prevent them from attempting to cross at said point.[106]

(3) Although you may believe from the evidence that it was necessary to have a flagman at N and W streets, and that a flagman was so kept to notify or signal for cars to cross or to stop, still, if you find from the evidence that the car stopped south of N street, and while it was so stopped plaintiff started to alight from said car, and the conductor saw her attempting to alight while said car was stopped, it was his duty to cause said car to remain standing until plaintiff had a reasonable time to alight, notwithstanding the flagman may have signaled for the car to cross.[107]

§ 644. **Railroad company violating ordinances.**—(1) If you find from the evidence that the view of the approaching train was obstructed by buildings, trees and cars on the defendant's railroad at such crossing, to a traveler on such street from the north, and at the time of the injury a valid ordinance of the city of Warsaw was in force limiting the rate of speed of defendant's trains to five miles an hour in said city, and that the train which injured the plaintiff was, at the time of the injury, running at the rate of ten or fifteen miles an hour, then the defendant was guilty of negligence. And if you find from the evidence that such negligence produced the plaintiff's injury without any negligence on his part contributing to the injury, then your verdict should be for the plaintiff.[108]

[105] New York, C. & St. L. R. Co. v. Luebeck, 157 Ill. 595, 602, 41 N. E. 897; Chicago & I. R. Co. v. Lane, 130 Ill. 116, 123, 22 N. E. 513.

[106] Baltimore & O. R. Co. v. Owings, 65 Md. 505, 5 Atl. 329.

[107] Jackson v. Grand Ave. R. Co. 118 Mo. 212, 24 S. W. 192.

[108] Pennsylvania Co. v. Horton, 132 Ind. 193, 31 N. E. 45.

(2) If you believe from the evidence that an ordinance of the city of L required the defendant, when moving any car, cars or locomotives propelled by steam power within the limits of the city, to cause the bell of the engine to be constantly sounded, and when backing any freight car, cars or locomotive propelled by steam power near the city limits to have a man stationed on the top of the car at the end of the train farthest from the engine to give danger signals, and further required that no freight train should at any time to be moved within city limits without being well manned with experienced brakemen at their posts, so stationed as to see the danger signals and to hear the signals from the engine, then any neglect or failure by the defendant, its agents, servants or employés, to comply with any or all of the above requirements, was of itself negligence on the part of the defendant; and if you believe from the evidence that, as a rsult of such negligence or failure on the part of the defendant, its agents, servants or employés, the plaintiff was injured, you will give a verdict in favor of the plaintiff, unless you also believe from the evidence that plaintiff was himself guilty of negligence which contributed directly to cause of his injuries.[109]

(3) If the defendant was engaged in the business of transporting passengers for hire from one point to another within the city of St. L, on or about the fifth day of June, 1893, then by the ordinance read in evidence, it became the duty of the gripman in charge of the gripcar to keep a vigilant watch for persons on foot, especially for children, either on its track or moving toward it; and on the first appearance of danger to such person or child, it was the duty of the gripman to stop the car in his charge in the shortest time and space possible under the circumstances.[110]

(4) If you find that the car which struck the plaintiff's buggy at the time of or just previous to the collision was being run at a greater rate of speed than eight miles an hour, which is the limit under the ordinance of the city of S, you would be justified in finding the defendant guilty of negligence in running the car at such rate of speed; and, if you further find that such negligence caused the injury complained of, you should

[109] Dahlstrom v. St. Louis, I. M. & S. R. Co. 108 Mo. 533, 18 S. W. 919.

[110] Hogan v. Citizens R. Co. 150 Mo. 44, 51 S. W. 473.

find for the plaintiff, unless he was guilty of contributory negligence.[111]

§ 645. Fire escaping from engine and burning property.—(1) The rule for the measure of damages, if there is a right of recovering, is the difference, if any, between the fair market value of the land burned over, belonging to the plaintiff, immediately before the fire, and its fair market value immediately afterwards.[112]

(2) If the jury believe from the evidence that the property of the plaintiff was burned in consequence of the failure of the defendant company to use the best appliances and safeguards, in the nature of ash-pans and spark arresters on their engines, and such as are generally adopted by and used upon the modern leading railroads in this country, the defendants are liable for any loss occasioned by any such omission.[113]

(3) If from the evidence the jury find that defendant's engine set out the fire alleged, and also that the same engines set out several successive fires on the same trip, and on the same day, then the fact of the repeated setting out of such fires will be evidence tending to show that the defendant's engine was not properly constructed as to its appliances for the prevention of the escape of fire, or that the same was not properly used at the time, or that it was not in repair, and as such, must be considered by you in making up your verdict, and in determining as to whether or not this fire occurred through the fault or negligence of defendant or its employés.[114]

(4) If you believe that the plaintiff allowed hay or other rubbish to accumulate on or about his property, or left any cracks or openings in his building through which fire from a passing locomotive could readily communicate to the hay or other inflammable matter inside such building, and that the fire was first communicated to the scattered hay or other inflammable rubbish so left exposed, or to the hay or other inflammable matter exposed through the cracks or openings of the buildings, and you further believe that the doing or permitting these things

111 Traver v. Spokane St. R. Co. 25 Wash. 241, 65 Pac. 284.

112 Chicago, I. & L. R. Co. v. Brown, 157 Ind. 547, 60 N. E. 346.

113 Kimball & F. v. Borden, 97 Va. 478, 34 S. E. 45.

114 Slossen v. Burlington, &c. R. Co. 60 Iowa, 217, 14 N. W. 244.

on the part of the plaintiff, were what an ordinarily prudent man would not have done under the same or like circumstances, then the plaintiff cannot recover because of his negligence.[115]

(5) If the jury believe from the evidence that the defendant's engine was furnished with a spark arrester and other appliances for the purpose of preventing the escape of fire or sparks, of a good character, and such as was in general use at the time by well regulated railroads and that such appliances were in good condition and that the defendant was not guilty of negligence in operating its engine and train, but that fire nevertheless escaped and fell upon the plaintiff's premises and set it on fire, the jury ought to find for the defendant.[116]

(6) The court charges the jury that if they believe from the evidence that one of the defendant's engines threw sparks upon the plaintiff's shed, or directly against it, and that the sparks so thrown themselves set fire to the shed and that the burning shed communicated the fire to the plaintiff's other property; and further that such engine was furnished with a spark arrester and other appliances of approved character to prevent, so far as possible, throwing sparks and was properly handled by the engineer, and that such spark arrester and other appliances were in good condition, then they ought to find a verdict for the defendant.[117]

§ 646. **Killing stock from failure to fence track.**—(1) The first paragraph of the plaintiff's complaint is based upon a statute of the state which requires railroad companies operating roads in this state to securely fence in the tracks of their roads. A railroad company operating a railroad in this state is required to securely fence in its track, and where this is not done, the railroad company so operating the road is liable for all damages done to stock by its locomotives and cars while being operated upon its road without regard to the question whether such injury was the result of willful misconduct or negligence, or the result of unavoidable accident.[118]

[115] Atchison, T. & S. F. R. Co. v. Ayers, 56 Kas. 181, 42 Pac. 722.

[116] Louisville & N. R. Co. v. Sullivan Timber Co. (Ala.), 35 So. 330. See, Chicago, &c. R. Co. v. Pennell, 110 Ill. 435; Illinois Cent. R. Co. v. McClelland, 42 Ill. 355.

[117] Louisville & N. R. Co. v. Sullivan Timber Co. (Ala.), 35 So. 331.

[118] Louisville, N. A. & C. R. Co. v. Grantham, 104 Ind. 357, 4 N. E. 49.

(2) If you find from the evidence that the plaintiff's cattle were killed by the locomotive, cars or other carriages used on the defendant's railroad in or running into or through Madison county, Indiana, and that such railroad was not securely fenced in and such fence was not properly maintained by the defendant where at the point, the cattle entered upon said road, then you should find for the plaintiff and assess his damages at the value of the cattle so killed.[119]

(3) If the jury believe, from the evidence, that the engine driver, by the use of ordinary skill and prudence, could have seen the cows spoken of by the witnesses, or that he did see the cows, and that he might, without danger, by the use of ordinary care, have stopped the train before striking the cows, and did not, that this would be negligence on the part of the defendant.[120]

(4) Even if you believe from the evidence that any hogs entered the plaintiff's field and did damage to his crop, as complained of in the petition, still, if you also believe from the evidence that there was a space of ground lying between the fence which the defendant had erected along the east side of the track, and another fence which was upon the west side of the plaintiff's enclosure, and that said strip of ground was open to a public highway at the south end, so that hogs and other stock could pass from the public road into said strip of ground, and that it was necessary for hogs to pass through or under both of said fences, and across said intervening strip of ground in order to get from defendant's inclosure along its track into the plaintiff's field, then the plaintiff cannot recover in this action, and your verdict must be for the defendant.[121]

(5) It is not necessary that the defendant should have erected its fence upon the line of its way. It had the right to locate the fence at any place between the edge of its track and the line of its right of way. Therefore if you should believe from the evidence that there was a strip of ground between the railroad fence and the plaintiff's fence, and that a part of the same was included within the line of the railroad right of way, but outside

[119] Cleveland, C. C. & I. R. Co. v. Bates, 91 Ind. 290.

[120] Toledo, P. & W. R. Co. v. Bray, 57 Ill. 514. Held not telling the jury that a certain state of facts constitute negligence, and not encroaching on the province of the jury.

[121] Kingsbury v. Missouri, K. & T. R. Co. 156 Mo. 384, 57 S. W. 547.

of the railroad fence, and that such strip of ground opened at the south end upon a public highway, and that hogs passed through or over said strip of ground, and thence under or through plaintiff's fence, and even, although in passing over said strip of ground they may have passed over the uninclosed portion of the right of way, still, that does not entitle the plaintiff to recover, and under such circumstances, if you so find, your verdict should be for defendant.[122]

(6) If the horse in question got onto the defendant's railway track from a highway crossing, at a point where the defendant had a side-track crossing the highway, on which it received and discharged freight, and which it had constructed and used for the convenience of the public and in the transaction of its business with them, then the defendant was not required to fence in or inclose its track at that point, and the plaintiff could not recover.[123]

(7) The law does not require the defendant to fence its road at stations or sidings where freight is received and discharged, and the defendant is not liable in an action like this for stock that may go upon the track at such point and get killed.[124]

(8) The rules of law as to diligence and negligence apply to stock owners as well as to railroad companies. Hence, if hogs were prohibited by law from running at large in the township where the plaintiff's hogs were kept by him, and were killed by the defendant's railroad train, the law required from the plaintiff the same degree of diligence to keep his hogs from escaping, that it required from the railroad company to avoid killing them when they got in front of its train; and if the plaintiff failed to use that degree of diligence to keep his hogs from escaping, he cannot recover in this action.[125]

If you find from the evidence in this case that the guards in question were not such guards as were approved by the railroad commissioner, or that they were not placed down as required by the railroad commissioner, under his plans and specifications submitted here, then you would find the defendant liable under further instructions that I will give you. Or, if you find that

[122] Kingsbury v. Missouri, K. & T. R. Co. 156 Mo. 385, 57 S. W. 547.

[123] Indiana, B. & W. R. Co. v. Sawyer, 109 Ind. 344, 10 N. E. 105.

[124] Indiana, B. & W. R. Co. v. Sawyer, 109 Ind. 344, 10 N. E. 105.

[125] Leavenworth, T. & S. W. R. Co. v. Forbs, 37 Kas. 448, 15 Pac. 595.

they were such guards, and were so placed, as required by the plans and specifications approved by the commissioner of railroads, but that the company had negligently failed to keep such guards in repair, then you will find them liable. When I say "keep them in repair," I mean in good and sufficient repair, so they would serve the purpose for which they were placed there. I do not mean that, if you find they were in that condition, they would be liable; but you must further find that this injury was occasioned because of such defect, if you find it. In other words, if you find that the guards in question are such as are approved, and further find that the company negligently failed to keep the same in repair, (that is, negligently permitted them to fill up between the slats with cinders, ballast or dirt,) and that these cattle went upon the railroad track, over these guards so out of repair, and that the injury was occasioned by such want of repair, then the defendant would be liable. If, on the other hand, you do not find these things to be true, then they would not be liable; that is, if you find that the guards were in repair, the company would not be liable, or, if you find that the injury was not occasioned because of the want of repair, then the company would not be liable.[126]

§ 647. **Essential facts necessary to a recovery.**—(1) The facts necessary to be established by the plaintiff by a preponderance of all the evidence, to entitle him to recover, are first, negligence on the part of the defendant in the matter complained of; second, plaintiffs' freedom from fault or negligence in the matter complained of; and third, damage to the plaintiff proximately caused by the defendants' negligence; and a failure to establish any of these by a preponderance of all the evidence will preclude a recovery.[127]

(2) It appears that the plaintiff was struck and injured by the engine of the defendant while in the act of crossing the railroad track and rescuing a little child from danger and saving its life. To hold the company responsible in damages for such injury in such case, it must be shown first, that the child was in danger of being run over and injured by an approaching engine, and that such danger was caused or created by the negligence

[126] Hathaway v. Detroit, T. & M. R. Co. 124 Mich. 610, 83 N. W. 598.

[127] Baltimore & O. S. R. Co. v. Young, 153 Ind. 168, 54 N. E. 791.

of the railroad company; and second, that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it is your duty to determine from the evidence in the case.[128]

(3) The first question then for you to determine is this: Did the water which flowed down the side of this hill in time of rainfall, and the thawing of snow, flow down through a natural and well-defined channel, or did it not? If it did, the defendant had no right to change the flow of that water so as to produce injury to the plaintiff. If it did not flow down through a natural well-defined channel, but discharged itself generally upon the right of way of the defendant, then the defendant could provide for its discharge from that right of way in such a manner as it saw fit.[129]

§ 648. **Accident—No liability.**—(1) It is the duty of both the railroad company and of those operating its trains, and of persons traveling along the public highway, to use reasonable care and ordinary prudence to avoid collision at any point where the company's road and such public highway may cross each other, and if a collision should occur at any such crossing, and any injury should happen from such collision, and neither party should be guilty of negligence in causing such collision, then no action could be maintained by reason of such an injury. It would be an accident for which the law gives no remedy.[130]

(2) If the jury further believe from the evidence that the engineer in control of the extra passenger train was keeping the proper lookout which it was his duty to keep, that he saw the hand car as soon as it could be seen under the circumstances, and applied all the means within his power as quickly as they could be applied under the circumstances, and that he continued to use all the means within his power which a prudent man with the requisite skill and in the use of ordinary care would have used under the circumstances, and that the appliances for stopping and controlling the train were in good order, then they will find for the defendant.[131]

[128] Pennsylvania Co. v. Langendorf, 48 Ohio St. 321, 28 N. E. 172.

[129] Fossum v. Chicago, M. & St. P. R. Co. 80 Minn. 12, 82 N. W. 979.

[130] Gulf, C. & S. F. R. Co. v. Greenlee, 70 Tex. 557, 8 S. W. 129.

[131] Davidson v. Pittsburg, C. C. & St. L. R. Co. 41 W. Va. 416, 23 S. E. 593.

(3) Unless the jury are satisfied from the evidence that the person or persons in charge of the extra passenger train failed to stop the train as soon as a prudent man of the requisite skill and in the exercise of ordinary care would have done under the circumstances, and unless they further believe that D's death was caused by that failure, they will find for the defendant.[132]

(4) If the jury believe from the evidence that the engineer was looking out for a flag on the right-hand side of the road, at a place shortly beyond where the deceased was injured, and just before he was struck, and that the engineer did not see the deceased on the track or know he was there until too late to stop, then, under the evidence in this case, the negligence of the engineer, if such there was, was not such gross, wanton, intentional wrong as will make the defendant liable, provided the jury find the deceased walked down or on the track without looking back.[133]

(5) If the jury believe from the evidence in this case that while the defendant and its servants were (if they were) exercising ordinary care, the plaintiff, at the time and place of the injury, suddenly and unexepectedly, and without the knowledge of the defendant, drove his wagon across and upon defendant's track and thereby placed himself in a position of danger, then, in order to charge the defendant with a duty to avoid injuring him, the plaintiff must show, by a preponderance of the evidence in the case, that the circumstances were of such character that the defendant's servant or servants had an opportunity to become conscious of the facts giving rise to such duty, and a reasonable opportunity in the exercise of ordinary care and caution, to perform such duty. And if the jury further believe from the evidence that the facts as shown by the evidence did not charge the defendant and its servants with a duty as thus defined, or if the jury believe from the evidence, that the defendant and its servants did not have a reasonable opportunity, in the exercise of ordinary care, to perform such duty as thus defined, then they should find the defendant not guilty. And if the jury believe from the evidence in the case, that the plaintiff suddenly and unexpectedly drove his

[132] Davidson v. Pittsburg, &c. R. Co. 41 W. Va. 416, 23 S. E. 593.

[133] Frazer v. South & North Ala. R. Co. 81 Ala. 190, 1 So. 85.

wagon across and upon the defendant's track in front of the car of the defendant which occasioned the injury, and that the servant or servants of the defendant in charge of such car did all that could be done, in the exercise of ordinary care, to avoid injuring and damaging him, then the plaintiff cannot recover in this case, and the jury should find the defendant not guilty.[134]

Cases of Death.

§ 649. **Measure of damages to next of kin.**—(1) If the jury believe from the evidence that B, the deceased, was the husband of the plaintiff in this suit, and that the said B was rightfully upon the defendant's engine by the invitation and direction of the conductor and manager of the same, and that he was using ordinary care for his safety, and was, by and through the carelessness and negligence of the defendant's servants in running and handling the said engine, thrown therefrom to the ground, and run over by a car and injured, from which injuries the said B afterwards died, then the jury will find for the plaintiff, and assess her damages at such sum as they believe, from all the evidence, she has sustained, not exceeding ten thousand dollars.[135]

(2) The jury are instructed that in estimating the pecuniary injury, if they believe from the evidence that the widow and minor children of said deceased, have sustained any injury for which the defendant is liable, they have a right to take into consideration the support of the said widow and minor children of the deceased, and the instruction, and physical, moral and intellectual training, of the minor children of the deceased, and also the ages of the said minor children, and the pecuniary condition of the said minor children and widow of the deceased, in determining the amount of damages, if they believe from the evidence that the said deceased left a widow and minor children.[136]

[134] Chicago U. Tr. Co. v. Browdy, 206 Ill. 617.

[135] Lake S. & M. S. R. Co. v. Brown, 123 Ill. 182, 14 N. E. 197. This instruction does not assume that the defendant's servants were guilty of negligence. See post n. 139.

[136] Illinois C. R. Co. v. Weldon, 52 Ill. 294, citing Tilly v. Hudson River R. Co. 29 N. Y. 252.

(3) If the jury find for the plaintiff, they will assess her damages at such a sum as in their judgment will be a fair and just compensation to her for the loss of her husband, not exceeding the sum of ten thousand dollars.[137]

(4) If you should consider that the defendant was in default in this case, then of course you would have to consider the question of compensation. As has been stated to you by both counsel originally there was no right of action to a survivor in a case of this character. The person who was injured had a right to damages for pain and suffering and anguish which he had endured. The legislature, however, have changed the old common law, and the representative, the widow, now has a right to bring a suit for the pecuniary loss which she sustained. Now of course in all these cases nobody pretends that these companies act maliciously. They operate entirely through their agents, and if their agents are negligent, they are undoubtedly obliged to suffer for it just as an individual would be. Just as a man driving your carriage, if he negligently should run into some one else, you would be responsible for what he did, because he was your servant, and your agent and performing the duty for which you had employed him. Therefore there ought to be a reasonable compensation.[138]

(5) The law makes it the duty of every operator and owner of a coal mine to securely fence the top of the shafts by gates properly protecting the shaft and the entry thereto, and if such operator fails willfully to so fence the shaft, and by reason of such failure, a person employed about the mine is killed, the owner or operator is liable to the widow of the person so killed for damages not to exceed the sum of ten thousand dollars.[139]

(6) The law makes it the duty of the owner, agent or operator of every coal mine to keep a supply of timber constantly on hand, of sufficient lengths and dimensions to be used as props and cap-pieces and to deliver the same as required with the miner's empty car, so that the workmen may at all times be able to properly secure said workings for their own safety, and if such operator willfully fails so to do, and by reason of

[137] Browning v. Wabash W. R. Co. 124 Mo. 65, 27 S. W. 644.

[138] Connor v. Electric Tr. Co. 173 Pa. St. 605, 34 Atl. 238.

[139] Catlett v. Young, 143 Ill. 74, 32 N. E. 447. Ten thousand dollars is the statutory limit now.

such failure a person employed about the mine is killed, the owner or operator is liable to the widow of the person killed for damages not exceeding the sum of ten thousand dollars.[140]

(7) If the jury believe from the evidence that on the twenty-second day of January, 1898, Frank Duffy came to his death, while in the exercise ordinary care for his own safety, in the manner and by the means set forth in the plaintiff's amended declaration, and if the jury further believe, from the evidence, that the death of the said Frank Duffy was caused by the negligence of the defendant, as charged in said declaration; and if the jury further believe, from the evidence, that the said Frank Duffy left surviving him a widow and children, as stated in said declaration, and that such widow and children, by the death of the said Frank Duffy, have been and are deprived of their means of support, then, in law, the plaintiff is entitled to recover.[141]

(8) If you find for the plaintiff, you will look to the evidence in determining the amount of damages you will allow. In arriving at a conclusion, you will look to the evidence as to the age of the plaintiff's husband, the probable length of his life, the amount he earned or would probably earn during his life, and you will also consider his state of health.[142]

(9) This case is to be tried in the same manner and governed by the same principles of law, as if the deceased had not died of the injuries and had commenced an action for the recovery of damages for the injuries; or, in other words, that this action can be sustained under such state of facts only as would have entitled the deceased, had he lived, to have maintained an action and recover damages for the injuries which caused his death.[143]

(10) That in making the calculation as to the amount the plaintiff would be entitled to recover, you would have a right and it would be proper for you to consider whether or not the capacity of the plaintiff's husband to labor and earn money would have decreased by reason of advancing years, and if you believe under

[140] Mt. Olive Coal Co. v. Rademacher, 190 Ill. 540, 60 N. E. 888; Catlett v. Young, 143 Ill. 74, 32 N. E. 447.

[141] Economy L. Co. v. Stephen, 187 Ill. 137, 58 N. E. 359.

[142] Georgia R. Co. v. Pittman, 73 Ga. 331.

[143] Darling v. Williams, 35 Ohio St. 58.

the evidence that it would have decreased in the same proportion as you believe his capacity to labor and earn money would have diminished, in the same proportion would it be proper and right that your finding and verdict would be diminished.[144]

(11) This case is to be tried in the same manner and governed by the same principles of law as if the deceased had not died of the injuries complained of, and had himself commenced an action to recover damages for his injuries; or, in other words, that this action can be sustained only under such state of facts as would have entitled the deceased to have maintained an action and recovered damages for such injuries, had he lived. If you find for the plaintiff you will look to the evidence in determining the amount of damages you will allow, and in arriving at a conclusion you have a right to take into consideration the ability of the deceased to labor and earn money, and whether or not the capacity of the deceased to labor and earn money would have decreased by reason of advancing years; and you have the right to consider the age of the deceased, the probable length of his life, his health and the amount he earned or would probably earn during his life. You have also the right to take into consideration the support of the widow and minor children of the deceased, the instruction and proper training of any such minor children, their ages, and the pecuniary circumstances and condition of such widow and minor children, if the deceased left a widow and minor children, and you will assess the damages at such a sum as in your judgment, from the evidence, will be a just, fair and reasonable compensation to such widow and minor children not exceeding the sum of ten thousand dollars.[145]

(12) If the jury find that J, the deceased, was related to the equitable plaintiff as alleged in the declaration, and that on the first day of April, 1893, the deceased and R were engaged in a fight near the defendant's store, and that the defendant came out of his store and seeing the fight ran up to within a short distance of J, the deceased, and fired his pistol toward him and shot and killed him, the verdict must be for the plaintiff, unless

[144] Georgia R. Co. v. Pittman, 73 Ga. 330.

[145] Darling v. Williams, 35 Ohio St. 58; Georgia R. Co. v. Pittman, 73 Ga. 331; Illinois Cent. R. Co. v. Welden, 52 Ill. 294; Browning v. Wabash W. R. Co. 124 Mo. 65, 27 S. W. 644; Connor v. Electric Tr. Co. 173 Pa. St. 605, 34 Atl. 238.

the jury believe by preponderating proof that the shooting was done for the purpose of preventing the deceased from killing R or inflicting upon him great bodily harm, and that the circumstances at the time of the shooting were such as to warrant a reasonable belief in his mind in the exercise of his judgment that there was no other reasonably possible—or at least probable—means of preventing such injury; and that his act was necessary.[146]

§ 650. **Damages restricted to pecuniary loss.**—(1) If the jury find from the evidence, and under the instructions of the court, that the defendant corporation is guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the death of the deceased, then the plaintiff is entitled to recover such damages as the jury may deem, from the evidence or proof, a fair and just compensation, therefor, having reference only to the pecuniary injuries resulting from said death, to the plaintiff and next of kin, not exceeding the amount stated in the declaration. Grief or sorrow for the deceased or any pain caused to the next of kin by the manner of his death, is not to be considered by the jury, and the pecuniary value of the life of the deceased to the next of kin himself surviving, is all for which damages can be assessed.[147]

(2) If the jury believe from the evidence that B, the deceased, was rightfully on the defendant's engine, as alleged in the declaration in this cause, and that while he was on said engine he was using ordinary care on his part for his personal safety, and was, by and through the carelessness of the defendant's servants in running and handling said engine, thrown from said engine, and injured, from which said injuries the said B died, then the jury should find for the plaintiff, and give her such damages as they deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of the said deceased, not exceeding ten thousand dollars.[148]

[146] Tucker v. S. use of Johnson, 89 Md. 472, 43 Atl. 778, 44 Atl. 1004.

[147] Pennsylvania Co. v. Marshall, 119 Ill. 404, 10 N. E. 220.

[148] Lake Shore & M. S. R. Co. v. Brown, 123 Ill. 182, 14 N. E. 197.

(3) If you believe from the evidence that Edna I. Van Pelt, while in the exercise of ordinary care for her safety and without fault or negligence on her part lost her life by and through the negligence of the defendant, as charged in the declaration, and that said Edna I. Van Pelt left her surviving next of kin, then you should find the defendant guilty, and assess the plaintiff's damages at such sum as you believe, from the evidence, will be a fair and just compensation, based upon the pecuniary loss, if any, resulting from the death of the said Edna I. Van Pelt to her said next of kin, not exceeding the sum claimed in the plaintiff's declaration.[149]

(4) The court instructs the jury that if they find a verdict for the plaintiff they are not confined, in assessing the damages, to the pecuniary value of the services of the deceased to her next of kin until she would have arrived at the age of eighteen. But the jury may consider the pecuniary benefits which the next of kin may have derived from said deceased, had she not been killed, at any age of her life.[150]

(5) If the jury should find from the evidence in the case and under the instructions of the court, that the defendant is guilty of the wrongful act, neglect or default, as charged in the plaintiff's declaration and that the same resulted in the death of Patrick Dowd, then the plaintiff is entitled to recover in this action, for the benefit of the widow and next of kin of such deceased, such damages as the jury may deem, from the evidence, a fair and just compensation thereof, having reference only to the pecuniary injuries from such death to such widow and next of kin, not exceeding the amount claimed in the declaration.[151]

(6) If the jury should find from the evidence that the defendant is guilty of the wrongful act, neglect or default, as is charged in the plaintiff's declaration, and that the same resulted in the death of P, then the plaintiff is entitled to recover in this action, for the benefit of the next of kin of said deceased, such damages as the jury may deem, from the evidence, a fair and just compensation with reference to the pecuniary injuries re-

[149] Calumet St. R. Co. v. Van Pelt, 173 Ill. 71, 50 N. E. 678.

[150] Baltimore & O. S. R. Co. v. Then, 159 Ill. 535, 538, 42 N. E. 971.

[151] Chicago, M. & St. P. R. Co. v. Dowd, 115 Ill. 659, 4 N. E. 368. Held to relate solely to the measure of damages.

sulting from such death to such next of kin not exceeding ten thousand dollars.[152]

(7) If you find the issues for the plaintiff, then you should assess the plaintiff's damages at such sum as you believe from the evidence to be a proper pecuniary compensation for damages to her surviving husband and next of kin occasioned by her death, not exceeding ten thousand dollars.[153]

(8) If you find for the plaintiff, you will estimate the damages to which he is entitled; and in so doing, you will not allow anything for pain and suffering of the deceased, nor wounded feelings nor grief of his relatives, nor anything by way of exemplary damages or punishment of defendant, nor infer any fortuitous circumstances whereby the income or fortune of the deceased might be increased or improved had he lived. This suit is brought only to recover a pecuniary loss, namely, what the estate of the deceased had lost in consequence of his untimely death, and no more. And, in determining what amount you will allow, you should take into consideration the age of the deceased, his occupation, the wages he was receiving, the condition of his health, his ability, if any, to earn money, his expenditures and habits as to industry, sobriety and economy, the amount of property which he had accumulated at the time of his death, if any, the probable duration of his lifetime, and all these in connection with all the evidence before you, throwing light on this question and determine therefrom the probable pecuniary loss to the estate caused by his death and allow the plaintiff such sum and such only as will compensate the estate for such loss.[154]

(9) If under all the evidence the jury find for the plaintiff, the proper measure of damages is the pecuniary loss suffered by her and her two children; and that loss is what her husband would have probably earned by his labor in his business during his lifetime, and which would have gone for the benefit of the plaintiff and her two children, taking into consideration his age, ability,

[152] Chicago, B. & Q. R. Co. v. Payne, 59 Ill. 534, 541. Held not withdrawing from the jury all consideration of the conduct of the deceased.

[153] Cleveland, C. C. & St. L. R. Co. v. Baddeley, 150 Ill. 335, 36 N. E. 965.

[154] Spaulding v. Chicago, St. P. & K. C. R. Co. 98 Iowa, 219, 67 N. W. 227.

and disposition to labor, and his habits of living and expenditure.[155]

(10) If you find from the evidence and under the instructions of the court that the defendant corporation is guilty of the wrongful act, neglect or default as charged in the plaintiff's declaration and that such wrongful act resulted in the death of the deceased, then the plaintiff is entitled to recover such damages as the jury may deem, from the evidence, to be a fair and just compensation, having reference only to the pecuniary injuries resulting to the plaintiff and next of kin, from the death of the deceased. In estimating the damages, if any, you will not allow anything for pain and suffering of the deceased, nor grief nor wounded feelings of his relatives, nor anything by way of exemplary damages or punishment of the defendant. And in determining what amount you will allow, you should take into consideration the age of the deceased, his occupation, business capacity, habits, experience, the condition of his health, the probable duration of his life, the wages he was receiving, if any at the time of his death, and his probable earnings during his probable duration of life. You have also the right to take into consideration the support of the widow and minor children of the deceased, if he left a widow and minor children; also the instruction and proper training of any such minor children, their ages, and the pecuniary circumstances of such widow and minor children, and you will assess the damages at such sum as in your judgment, from all the evidence before you, will be fair and reasonable compensation for the loss sustained by the said next kin of the deceased, not exceeding ten thousand dollars.[156]

(11) If the jury believe from the evidence that the plaintiff

[155] Huntingdon & B. T. R. v. Decker, 84 Pa. St. 422.

[156] Pennsylvania Co. v. Marshall, 119 Ill. 404, 10 N. E. 220; Lake S. & M. S. R. Co. v. Brown, 123 Ill. 182, 14 N. E. 197; Chicago, M. & St. P. R. Co. v. Dowd, 115 Ill. 659, 4 N. E. 368; Cleveland, C. C. & St. L. R. Co. v. Bradley, 150 Ill. 335, 36 N. E. 965; Spaulding v. Chicago, St. P. & K. C. R. Co. 98 Iowa, 219, 67 N. W. 227; Huntington & B. T. R. v. Decker, 84 Pa. St. 422; McDonald v. Norfolk & W. R. Co. 95 Va. 100, 27 S. E. 821; Davis v. Guarnieri, 45 Ohio St. 478, 15 N. E. 350; Nelson v. Lake S. & M. S. R. Co. 104 Mich. 587 (how to find the present value); 62 N. W. 993.

is entitled to recover, in estimating the damages the jury should find the sum with reference:

First. To the pecuniary loss of the widow and child, at a sum equal to the probable earnings of the deceased, considering his age, business, capacity, experience, habits, energy, and perseverance during his probable life.

Second. In ascertaining the probability of life reference may be had to the scientific tables on that subject.

Third. They may consider the loss of his care, attention, and society to his widow and child.

Fourth. They may add such sum as they deem fair and just by way of solace and comfort to his widow for the sorrow, suffering, and mental anguish occasioned by his death, provided they do not find over ten thousand dollars.[157]

(12) In ascertaining the amount of damages plaintiff is entitled to recover in this case, if any, the jury will take into consideration:

First. By fixing the same at such sum as would probably be equal to the earnings of the deceased, taking into consideration the age, business, capacity, and experience and habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed.

Second. By adding thereto the value of his services in the superintendence, attention to and care of his family, of which they have been deprived by his death.

Third. The physical pain of the deceased, as well as the mental suffering of the surviving members of his family.

Fourth. The loss to his family in reference to his moral and intellectual training.[158]

(13) In assessing damages you are to estimate the reasonable probabilities of the life of the deceased G and give the equitable plaintiffs such pecuniary damages as you may find that they have suffered or will suffer as the direct consequence of the death of the said G; that for his children these prospective damages

[157] McDonald v. Norfolk & W. R. Co. 95 Va. 100, 27 S. E. 821; Com. Club v. Hilliker, 20 Ind. App. 239, 50 N. E. 578.

[158] Baltimore & O. R. Co. v. Few, 94 Va. 85, 26 S. E. 406.

may be estimated to their majority; and as to the widow of such probability of life as you may find reasonable under the circumstances.[159]

(14) The plaintiff's damages, if any, should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of the wife. In no case can the jury, in estimating such damages, if any, consider the bereavement, mental anguish, or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased, had she lived, is a proper subject for the consideration of the jury, if they find for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of the wife in a pecuniary point of view is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money for the loss of the services of the wife, that the jury are to find if they find a loss. It is that same which put in money is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered; that is, the age, health, probability of length of life, or death if she had not died from taking the drug.[160]

(15) The measure of damages in this case is the present value of the amount of money which the plaintiff and the minor children would have received from the deceased during the continuance of her life, had she lived. The present value of a sum of money payable in the future is what that sum is worth if paid presently—paid now. For example, the present value of one dollar at six per cent. at the end of one year is found by dividing one dollar, by one dollar and six cents; and the present value of one dollar at the end of to years is found by dividing one dollar by one dollar and twelve cents.[161]

[159] President, M. Co. of B. & R. Turnpike R. v. State, 71 Md. 576, 18 Atl. 884.

[160] Davis v. Guarnieri, 45 Ohio St. 478, 15 N. E. 350.

[161] Nelson v. Lake S. & M. S. R. Co. 104 Mich. 587, 62 N. W. 993.

§ 651. Damages—Instructions for defendant.—(1) You are instructed that in considering the damages in this case, it is your duty to dismiss from your minds all consideration of the grief, sorrow and mental affliction of the widow and children of the deceased; to dismiss from your minds all personal feeling and sympathy which may have been aroused by the recital of the circumstances of the casualty, and consider only the pecuniary injury.[162]

(2) If you believe from the evidence that the capacity of the plaintiff's husband would be decreased by reason of advancing years, then it would be your duty to diminish the amount that you may find for the plaintiff accordingly.[163]

(3) The Carlisle tables have been offered in evidence, but you are not to regard such tables as proving that plaintiff is to recover for forty and three-fourths years of life. You are to bear in mind that W was liable to die at any time, and that there was no certainty that he ever would have lived until he was twenty-one years old. You are not to presume that he would be diligent in acquisition of property or successful in saving what he might acquire.[164]

Measure of Damages.

§ 652. Consider permanency of injury, health, business, expense, time.—(1) If you find for the plaintiff you will be required to determine the amount of her damages. On this subject the court instructs you that in estimating the damages, you will consider her bodily pain and suffering occasioned by the injuries or sickness, if any, resulting from such injury; and in case you find that the plaintiff has not yet recovered from such injury, or that by such injury she has to any extent been permanently disabled, then you should take such facts into consideration in estimating her damages to which you may add such amount as you, in the exercise of sound discretion, may think, from the evidence, will be just compensation for anxiety and distress of mind as are

[162] Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 91.

[163] Georgia R. Co. v. Pittman, 73 Ga. 325.

[164] Andrews v. Chicago, M. & St. P. R. Co. 86 Iowa, 684, 53 N. W. 399.

fairly and reasonably the plain consequences of the injury complained of.[165]

(2) If the jury find for the plaintiff they will fix the damages at such sum, not exceeding ten thousand dollars, as would be a fair compensation to the estate for the destruction of the power of the deceased to earn money; and in fixing such damages the jury should take into consideration the age of the deceased at the time of his death, and the probable duration of his life.[166]

(3) If you find from the evidence that the plaintiff is entitled to recover, then you will be required to determine the amount of damages he has sustained, if any. And in estimating the damages, you will take into consideration the plaintiff's bodily pain and suffering, if any, occasioned by the injury complained of, sickness resulting from the injury, if any, mental anguish suffered and endured by him on account of said injury, if any; his age, his health and condition before the injury complained of, and the effect on his health; and in case you find that the plaintiff to recover, and under such circumstances, if you so such injury he has to any extent been permanently disabled, then you should take these matters into consideration in estimating his damages. You should also consider the plaintiff's necessary and reasonable expenses incurred, if any, for medical and surgical aid or treatment, his loss of time, if any, the money he is or was making by his business or labor, the effect, if any, of the injury in the future upon the plaintiff in attending to his affairs generally in pursuing his business or calling, and allow him such damages as in your opinion, from all the facts and circumstances in evidence, will be a fair and just compensation for the injury he has sustained.[167]

[165] Pittsburg, C. & St. L. R. Co. v. Sponier, 85 Ind. 171.

[166] Smith v. Middleton, 112 Ky. 592, 56 L. R. A. 484.

[167] Pittsburg, C. & St. L. R. Co. v. Sponier, 85 Ind. 171; Philadelphia & W. B. R. Co. v. Anderson, 72 Md. 520, 20 Atl. 2; Washington A. & Mt. V. E. R. Co. v. Quayle, 95 Va. 748, 30 S. E. 391; Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 429, 3 N. E. 389, 4 N. E. 908; Terre Haute & I. R. Co. v. Brunker, 128 Ind. 551, 26 N. E. 178; Chicago & E. R. Co. v. Holland, 122 Ill. 470, 13 N. E. 145; North C. St. R. Co. v. Shreve, 171 Ill. 441, 49 N. E. 534; Tudor Iron Works v. Weber, 129 Ill. 539, 21 N. E. 1078; Eureka Block Coal Co. v. Wells (Ind. App.), 61 N. W. 236; Gorham v. Kansas City & S. R. Co. 113 Mo. 410, 20 S. W. 1060; Georgia P. R. Co. v. West, 66 Miss. 313, 6 So. 207; Southern P. R. Co. v. Smith, 95 Va. 190, 28 S. E. 173; Stanley v. Cedar R. & M. C. R. Co. 119 Iowa, 526, 93 N. W. 493; Chicago, B. & Q. R. Co. v.

(4) If the jury shall find a verdict for the plaintiff, then in estimating the damages they are to consider his health and condition before the injury complained of as compared with his present condition in consequence of said injury, and whether the same is in its nature permanent, and how far, if at all, it is calculated to disable him from engaging in employment for which, in the absence of such injury, he would have been qualified, and also the physical and mental suffering, if any, to which he was subjected by reason of such injury and to allow him such damages as in the opinion of the jury will be a fair and just compensation for the injury he has sustained.[168]

(5) If the jury shall find a verdict for the plaintiff, then in estimating damages they are to consider the health and condition of the plaintiff before the injury complained of as compared with his present condition in consequence of said injury, and whether the same is in its nature permanent; and if the jury further believe that the plaintiff's internal affliction is the natural and proximate consequence of the injury sustained by the defendant's negligence, then they are entitled to consider the same in awarding damages, even if they believe that at the time of the accident the plaintiff had a tendency or predisposition to the disease or trouble from which he now suffers.[169]

(6) If the jury believe from the evidence that the defendant company is liable in this action, then in estimating damages they should take into account the bodily injury, if any, sustained by the plaintiff, the pain undergone, the effects on the health of the sufferer according to its degree and its probable duration as being temporary or permanent, and the pecuniary loss sustained by the plaintiff, through his inability to attend to his business affairs after his arrival at the age of twenty-one years.[170]

(7) If you find under the evidence that the plaintiff is entitled

Warner, 108 Ill. 545; Cicero St. R. Co. v. Brown, 193 Ill. 274, 61 N. E. 1093; Springfield C. R. Co. v. Hoeffner, 175 Ill. 642, 51 N. E. 884; Wrisley Co. v. Burke, 203 Ill. 259, 67 N. E. 818; Chicago, R. I. & P. R. Co. v. Otto, 52 Ill. 417; Smith v. Middleton, 112 Ky. 592, 56 L. R. A. 484.

[168] Philadelphia & W. B. R. Co. v. Anderson, 72 Md. 520, 20 Atl. 2. See Mellor v. Missouri Pac. R. Co. 105 Mo. 455, S. W. 849.

[169] Baltimore & L. T. Co. v. Cassell, 66 Md. 421.

[170] Washington, A. & Mt. V. Elec. R. Co. v. Quayle, 95 Va. 748, 30 S. E. 391.

to recover, it will be your duty to assess the amount of damages which you in your judgment, think, from the evidence, she should recover. And in estimating the amount you may take into consideration any expenses actually incurred, loss of time, if any, occasioned by the immediate effects of her injuries and physical and mental suffering caused by and growing out of her injuries. And in addition you may consider the professional occupation, if any, of the plaintiff and her ability to earn money; and she will be entitled to recover for any permanent reduction if any, of her power to earn money by reason of her injuries, and the amount assessed should be such a sum as, in your judgment, will fully compensate her for the injuries or any of them, thus sustained.[171]

(8) If the jury find from the evidence that the plaintiff was injured by the wrongful negligent act of the defendants, the railroad's agents and servants, and while the plaintiff himself was acting with reasonable prudence, then in assessing his damages, the jury should take into account the peril if any there was, to the plaintiff's life; the suffering of body and mind, if any there was; the fact, if it is a fact, as shown by the evidence, that the injury he suffered is permanent; the extent of it; how far, if at all, the injury renders him less capable and fit to pursue his calling and business; any loss of time shown, its value if shown; any expenses incurred; and so considering said elements, the jury should assess such damages within the demand of the complaint as will reasonably and justly compensate the plaintiff for his injuries.[172]

(9) If the jury find the issues for the plaintiff, then the plaintiff is entitled to recover such actual damages as the evidence may show he has sustained as the direct or proximate result of such injury, taking into consideration his loss of time, his pain and suffering, his necessary and reasonable expenses in medical and surgical aid, and nursing, so far as the same may appear from the evidence in the case; and if the jury find from the evidence, that the said injury is permanent and incurable, they should also take this into consideration in assessing the plain-

[171] Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 429, 3 N. E. 389, 4 N. E. 908.

[172] Terre Haute & I. R. Co. v. Brunker, 128 Ind. 551, 26 N. E. 178.

tiff's damages; and the jury are instructed that the fact that the plaintiff is married and that his wife is living, cannot be considered by the jury in determining the amount of damages to which the plaintiff is entitled in this case.[173]

(10) If you find the issues for the plaintiff in this case, then the plaintiff is entitled to recover such actual damages as the evidence may show she has sustained as the direct or approximate result of such injury, taking into consideration her pain and suffering so far as the same may appear from the evidence in the case; and if the jury find from the evidence that said injury is permanent and incurable, they should take this fact into consideration in assessing the plaintiff's damages.[174]

(11) If, under the evidence in the case and the instructions of the court, you find the defendant guilty, then in estimating the plaintiff's damages, if any are proved, you have the right to take into consideration not only the loss, expenses and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question which renders him less capable of attending to his business than he would have been if the injury had not been received.[175]

(12) If from the evidence in the case and the law given you in these instructions, you find for the plaintiff, you may take into consideration the bodily pain and suffering caused by the injury if any has been shown, and the pain and suffering which will result therefrom in the future, if you find from the evidence that such will be the result; also the probability of the injuries she has received being permanent, and the extent, if any, to which the injury has incapacitated her for labor; also the reasonable expenses paid or incurred for the services of a surgeon or physician, made necessary by such injuries, and assess her damages at such sum as you may believe from all the evidence, will compensate her for the injury so sustained. You

[173] Chicago & E. R. Co. v. Holland, 122 Ill. 470, 13 N. E. 145.

[174] North C. St. R. Co. v. Shreve, 171 Ill. 441, 49 N. E. 534.

[175] Tudor Iron Works v. Weber, 129 Ill. 539, 21 N. E. 1078.

should allow no speculative damages, but only such as are compensatory.[176]

(13) If you find for the plaintiff in this cause, it will be your duty to assess his damages. The damages should be assessed on the basis of compensation for the injuries sustained. In doing so, you should take into consideration the question as to whether the plaintiff is temporarily or permanently injured; the question of his physical and mental suffering; the loss of time, if any, occasioned by his injury; the expense, if any, incurred in employing a physician or surgeon to treat his injuries; the expense incurred, if any, in nursing, and should award him such damages as will compensate him for his injuries, in any sum not exceeding ten thousand dollars.[177]

(14) To justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of.[178]

§ 653. **Consider age, pain, mental anguish.**—(1) If you find for plaintiff, you will in assessing his damages, take into consideration, his age, and condition in life, the injury sustained by him, if any, and physical pain and mental anguish suffered and endured by him on account of said injury, if any, his loss of time, if any, such damages, if any, as you believe from the evidence he will sustain in the future as the direct effect of such injury, such sums as he has paid out for medical attention on account of said injury, if any, together with all the facts and circumstances in evidence in the case, and assess the damages at such sum as from the evidence you may deem proper, not exceeding fifteen thousand dollars, the amount sued for.[179]

(2) In arriving at the amount of damages to be allowed in this case, if you allow any, you are not restricted to any procrustean rule in the mode of estimating the value of a life. The age of a man, the health he enjoys, the money he is making by his labor,

[176] Pomerene Co. v. White (Neb.), 69 N. W. 234.

[177] Eureka Block Coal Co. v Wells (Ind. App.), 61 N. W. 236. Held not objectionable as allowing the jury to go outside of the evidence in assessing damages.

[178] Ohio & M. R. Co. v. Cosby, 107 Ind. 35, 7 N. E. 373.

[179] Gorham v. Kansas City & S. R. Co. 113 Mo. 410, 20 S. W. 1060.

his habits, are data from which the jury may argue how long he will probably live and work, and what his life is worth to his wife in its pecuniary value. This is true generally, and this is the rule laid down by which you are to estimate the damages, if you find any.[180]

(3) If the jury believe from the evidence that plaintiff received injuries caused by the negligence of defendant, its servants or employees, that it is competent for them, in ascertaining the damages to which plaintiff is entitled, to take into consideration her physical condition prior to said injury, her age, capacity for labor, and the fact as to whether she was self-sustaining or being supported by others.[181]

(4) If the jury believe from the evidence that the defendant was guilty of negligence upon the occasion mentioned in the plaintiff's declaration, and that as a result of that negligence the said plaintiff was injured, they can take into consideration not only the bodily pain and suffering of the plaintiff, and the expenses she has been put to, but in addition may allow such damages as may reasonably seem to them fit, for the mental suffering and nervous shock which has resulted or may result from the said negligent act of said defendant.[182]

(5) If you find for the plaintiff, you should allow him such sum, not to exceed the amount claimed by him in his petition, as from the evidence will reasonably compensate him for the pain and suffering, if any, or loss of time, if any, or both suffered, or that will be suffered by him because of his injuries, if any, by him sustained by reason of colliding with the car of the defendant at the intersection mentioned, on or about the third day of May, 1899.[183]

(6) In determining the amount of damages the plaintiff is entitled to recover, if any, the jury have a right to and should, take into consideration all the facts and circumstances in evidence before them, the nature and extent of the plaintiff's physical injuries, if any, testified about by the witnesses in the case, her suffering in body and mind, if any, resulting from such injuries, and

[180] Central R. Co. v. Thompson, 76 Ga. 775.

[181] Georgia P. R. Co. v. West, 66 Miss. 313, 6 So. 207.

[182] Southern Pac. R. Co. v. Smith, 95 Va. 190, 28 S. E. 173.

[183] Stanley v. Cedar R. & M. C. R. Co. 119 Iowa, 526, 93 N. W. 493.

also, such prospective suffering and loss of health, if any, as the jury may believe, from all the evidence before them in the case, she has sustained or will sustain by reason of such injuries.[184]

(7) If, under the evidence and instructions of the court, the jury find the defendant guilty, then, in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in future upon the plaintiff, the use of his arm, and his ability to attend to his affairs generally, in pursuing any ordinary trade or calling, if the evidence shows that these will be affected in the future, and also the bodily pain and suffering he has sustained, and all damages, present and future, which, from the evidence, can be treated as the necessary and direct result of the injury complained of.[185]

(8) If under the evidence and instructions of the court, you find the defendant guilty, then, in assessing the plaintiff's damages, if any such damages as are alleged in her declaration are proved, you have a right to take into consideration the nature, extent and character of the injury sustained by her, so far as the same is shown by the evidence, if any such are so shown, the pain and suffering undergone by her in consequence of such injury, if any such is shown by the evidence, and assess damages in such sum as in your judgment will compensate the plaintiff for such injury and pain and suffering.[186]

(9) If under the evidence, and instructions of the court, the jury find the defendant guilty, then in estimating the plaintiff's damages, it will be proper for the jury to consider the effect of the injury in the future upon the plaintiff, if any is shown by the evidence, the use of his foot and leg, his ability to attend to his affairs, generally in pursuing any ordinary trade or calling, if the evidence shows that these will be affected in the future; and also the bodily pain and suffering he sustained, if any, and all damages present and future, if any, which from the

[184] Hannibal & St. J. R. Co. v. Martin, 111 Ill. 227. Held not assuming that the party is entitled to recover damages.

[185] Chicago, &c. R. Co. v. Warner, 108 Ill. 545. Held proper and that the latter clause did not submit a question of law to the jury.

[186] Springfield C. R. Co. v. Hoeffner, 175 Ill. 642, 51 N. E. 884. Held not objectionable as permitting the jury to go outside of the evidence in assessing damages.

evidence, can be treated as the necessary and direct result of the injury complained of.[187]

(10) If from the evidence in the case and under the instructions of the court, the jury shall find the issue for the plaintiff, and that the plaintiff has sustained damages as charged, in the declaration, then to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances proven by the evidence, and by considering them in connection with their knowledge, observation and experience in the business affairs of life.[188]

§ 654. **Considerations in mitigation of damages.**—(1) It was the duty of the plaintiff to use ordinary care, diligence and judgment, in securing medical or surgical aid after she received the injuries complained of, if she did receive any; and if you find from the evidence that she failed to use such ordinary care, diligence and judgment in procuring timely medical or surgical aid; and if you further find from the evidence that by reason of such failure her condition is now different and worse than it would have been if she had used such ordinary care, diligence and judgment in the premises, then, if you find for the plaintiff, you should take this into account in making up your verdict and should not allow any damages for ailments or diseases, if any, that may have resulted from such failure.[189]

(2) And so too it was the duty of the plaintiff to use ordinary care to cure and restore herself, and if you find from the evidence that the plaintiff failed to use such ordinary care in the premises, but that she unnecessarily exposed herself in inclement weather or otherwise, after receiving the injuries, if any she did receive in said accident and thereby increased and aggravated such injuries and enhanced their effects, you will take these facts into account in arriving at your verdict, if you find for the plaintiff, and should not allow any damages to the plain-

[187] Wrisley Co. v. Burke, 203 Ill. 259, 67 N. E. 818.

[188] North Chicago St. R. Co. v. Fitzgibbons, 180 Ill. 466, 54 N. E. 483.

[189] Louisville N. A. & C. R. Co. v. Falvey, 104 Ind. 424, 3 N. E. 389, 4 N. E. 908.

tiff for any ailments, injuries or diseases or their aggravation from which the plaintiff has been or may be suffering by reason of such exposure and from which she would not otherwise be suffering.[190]

(3) If you believe from the evidence that the plaintiff is entitled to damages, but believe that only nominal damages would be all the plaintiff should have, because of mitigating circumstances, if you believe the evidence shows mitigating circumstances, then you are authorized to award him only nominal damages.[191]

§ 655. **Customs, usages, rules relating to railroads.**—(1) By the term "general custom" is meant the general way of doing some particular thing,—the usual way of doing such thing. To establish a general custom in reference to any particular thing, or way or manner of doing such thing, it must be made to appear from the evidence that such custom was generally and uniformly extended to all persons, under like circumstances and conditions and that the same is notorious, that is, well understood. So if, in the case at bar, it does not appear from the evidence that all persons holding tickets or passes from points west of P to H were allowed to take their choice of line, either by A or O to H, then the general custom in question in this case is not established.[192]

(2) The railroad tracks and right of way of the defendant, at and about where the accident complained of is shown by the pleadings and evidence to have happened, was the property of the defendant, and if the jury shall find from the evidence that a pathway to either side of the defendant's said tracks had been made by persons traveling the same, and shall further find that said pathway continued across said tracks, and that persons had used the same as a near approach to the store building and station used by defendant for twenty-five years or more, and with knowledge of and without objection from the defendant or its agents, that such user by persons, however numerous and for however long a time, conferred no right upon the plaintiffs or other persons to use such pathway across said tracks, and

[190] Louisville, N. A. & C. R. Co. v. Falvey, 104 Ind. 425, 3 N. E. 389, 4 N. E. 908.

[191] Birmingham Ry. L. & P. Co. v. Mullen (Ala.), 35 So. 702.

[192] Milroy v. Chicago, M. & St. P. R. Co. 98 Iowa, 193, 67 N. W. 276.

imposed upon the defendant and its servants no duty to exercise greater care in the management and running of its trains at such pathway, than at other points on or along its road where there were no established crossings.[193]

(3) If the jury believe from the evidence that the rule or notice of the defendant read in evidence, relating to the use of tracks, by crews of the plaintiff's company in entering the defendant's yard, was habitually violated with the knowledge and acquiescence of the defendant or was not enforced as to the switching crew with which the plaintiff worked, then the jury should disregard such notice or rule in considering the whole case.[194]

[193] Baltimore & O. R. Co. v. Owings, 65 Md. 505, 5 Atl. 329.

[194] St. Louis N. S. Yards v. Godfrey, 198 Ill. 294, 65 N. E. 90.

CHAPTER XLIV.

REAL ESTATE.

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(2) In order to divest the title to the land described in plaintiff's declaration out of the plaintiff and vest it in the defendant by reason of his adverse possession, that possession must be actual, visible, notorious and hostile, continuous and uninterrupted, under a claim of title for a period of —— years next preceding the commencement of this suit.[2]

(3) If the defendants and those under whom they claim have adverse possession of so much of the premises mentioned and described in the petition as is covered by the building of the defendants, and said possession was open, notorious and hostile, under claim of title, and continuous for more than ten years prior to the institution of this suit, then the plaintiffs cannot recover the portion of said premises so covered by said building.[3]

(4) If you find from the evidence that the defendant entered into the occupancy and possession of the premises in question, claiming the title thereto exclusive of and hostile to any other right, and that such claim of title was made in good faith, the defendant believing that he had a good title to the land as the owner thereof, and further find that such occupancy and possession was

[1] Hoffine v. Ewings, 60 Neb. 731, 84 N. W. 93. See McAvoy v. Cassioy, 60 N. Y. S. 827.

[2] Dalby v. Snuffer, 57 Mo. 294. See Davenport v. Sebring, 52 Iowa, 364.

[3] Dalton v. Bank, &c. 54 Mo. 106.

actual and continued, uninterrupted and notorious and hostile to any other right or title to said land for a period of twenty years prior to the commencement of this action, and that during all that time the defendant so claimed title to said land, that would constitute adverse possession and would bar plaintiff's right to recover in this action, and your verdict in such case would and should be for the defendant.[4]

(5) If at the date this suit was commenced the defendant had been in peaceful and exclusive possession of the land up to the north line of the disputed strip and cultivated and claimed it as his own, and such claim of ownership has been open, notorious and adverse to all the world for more than —— years, then his possession and claim has ripened into a good title, and if you so find your verdict will be for the defendant. To be adverse, however, the holding or possession of the defendant must have been with the intention of insisting upon his right to the land in controversy as against all others and not by mere mistake as to the location of the line as fixed by the government survey.[5]

(6) If you believe from the evidence that S cleared and cultivated the land east of the old levee, beginning at an old stone in the southeast corner of the lot number seven of the D tract, and running eastwardly at right angles to said old levee toward the Mississippi river, and that he and those under whom he claims title have been in open, public, notorious and adverse possession thereof, claiming title thereto for more than ten years prior to the institution of this suit, the plaintiff is not entitled to recover any part of the land so occupied nor any part of the accretion thereto.[6]

(7) If the plaintiff's possession of the premises in dispute was open, notorious, exclusive and adverse, comporting with the usual management of a farm by its owner, though a portion was woodland and uncultivated, and though not wholly surrounded by fences or rendered inaccessible by other obstructions, it would constitute a disseizin of the true owner unaffected by other facts.[7]

[4] Bartlett v. Secor, 56 Wis. 520, 14 N. W. 714.

[5] Heinz v. Cramer, 84 Iowa, 497, 51 N. W. 173.

[6] Beene v. Miller, 149 Mo. 233, 50 S. W. 824.

[7] Gardner v. Gooch, 48 Me. 489.

(8) When a party claims to have acquired title to the lands of another by having held possession a length of time sufficient to bar the owner from retaking possession, he must, to succeed, show that his possession is of that exclusive, permanent, open, hostile and adverse character as to put the owner in the position of failing to assert his rights, knowing or having reason to know they were encroached upon for the full period of ——years.[8]

(9) To defeat the claim of the plaintiffs in this action upon the defense of adverse possession the jury must find from the evidence that the defendants in person or by their tenants have for more than twenty years prior to May thirty-first, 1889, held actual, exclusive, continuous, open, notorious and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who during such prior possession did not claim any title or right to the premises.[9]

§ 657. **Actual possession is essential.**—(1) If you believe from the evidence that the defendants and those under whom they claim have had possession of the land in dispute for more than twenty years prior to the commencement of this suit under claim of title, and adversely to all other claims of title, you must find for the defendants.[10]

(2) If T and his representative took actual possession of the tract of land in question by fencing up the whole of it, and held such possession claiming to be the owner thereof in fee, for more than twenty years prior to the entry of the defendants or those under whom they claim, such possession vested the fee in said T's representatives.[11]

(3) If you believe from the evidence that the defendant and those through whom he obtained possession of the property sued for, had had a continuous possession thereof for twenty years next before the commencement of this suit, claiming the same as their own, then you should find for the defendant as against each of the plaintiffs, who has not proved herself or himself either under twenty-one years of age or a married woman at the commencement of such possession; and the burden of proof is upon each

[8] Hochmoth v. Des Grand Champs, 71 Mich. 520, 39 N. W. 737.

[9] Holtzman v. Douglas, 168 U. S. 285, 18 Sup. Ct. 65.

[10] Wiggins v. Holley, 11 Ind. 5.

[11] Farrar v. Heinrich, 86 Mo. 527.

of the plaintiffs claiming to have been under such age, or a married woman at the commencement of such possession, to prove it affirmatively; and until it be proved to the satisfaction of the jury, the contrary thereof should be presumed by you.[12]

§ 658. Possession shown by acts of ownership.—(1) If you believe from the evidence that the plaintiff upon receiving and recording the deed from E to him dated September twenty-eighth, 1833, entered upon the land therein described and continued to have a visible possession, occupancy and improvement of only a portion thereof, such occupation and improvement, uncontrolled by other acts, were a disseizin of the true owner as to the whole of said land described in the deed, though E might not have had title thereto.[13]

(2) To constitute possession it is not necessary that the land should be enclosed with a fence, or that the same should be cultivated, resided upon or that buildings should be erected thereon. It is sufficient if the acts of ownership are of such a character as to openly and publicly indicate an assumed control or use such as are consistent with the character of the premises in question. If you find in the spring of 1868, or the summer of that year, B, after getting his deed, began the exercise of such acts of ownership and control as are usual by owners of timber lots when used to supply a farm in the neighborhood with timber, and his acts were of such an adverse, open, notorious and hostile nature as to clearly indicate that he asserted exclusive control over it, and that he continued to do so up to the time of his sale to H, and that afterwards H continued with like acts, you would be justified in finding that the defendants had been in such possession as to bar any claim of title on the part of the plaintiff, and your verdict should be for the defendants.[14]

(3) If you believe from the evidence in the case that the land in controversy or any considerable part thereof was susceptible of a definite occupation or possession, that is, that said land or any part of it was fit for pasture or cultivation without clearing or cutting away the timber thereon—then, in order to constitute the possession of the plaintiff, or that of those under whom he claims,

[12] Dessaunier v. Murphy, 33 Mo. 191.

[13] Gardner v. Gooch, 48 Me. 488.

[14] Murray v. Hudson, 65 Mich. 673, 32 N. W. 889.

adversely, you must believe from the evidence in the case that the plaintiff or his grantor, M, either in person or by their tenants, built permanent structures on said land, or actually inclosed or cultivated it or some part of it for the period of ten years prior to the institution of this suit, and that it is not sufficient in such a case that the plaintiff or his grantor, M, paid the taxes on said land, kept off trespassers, cut off timber, erected temporary structures and pastured stock thereon under a claim of ownership.[15]

(4) Neither physical occupation, cultivation nor residence is necessary to constitute actual adverse possession when the property is so situated as not to admit of any permanent useful improvement and the continued claim of the property has been evidenced by open, visible, continuous acts of ownership, known to and acquiesced in by the real owner, or so far notorious as to be presumed to be within his knowledge.[16]

(5) For the purpose of constituting adverse possession by a person claiming title to land not founded upon some written instrument or some judgment or decree, the land shall be deemed to have been possessed and occupied in the following cases only: (1) when it has been protected by a substantial inclosure; (2) when it has been usually cultivated and improved.[17]

(6) If you believe from the evidence that the defendant H, not less than ten years prior to the commencement of this suit, entered into possession of the land in controversy and cultivated or fenced the same, or erected improvements of any kind thereon, or did any other acts of such a character as to clearly show that he was occupying said land and claiming it the same as his own, and during all of said time continued to so occupy said land claiming during all of said time to be the owner thereof, and never during any of said period of time abandoned the land, but during all of the time of said ten years continued openly, notoriously, adversely and exclusively to occupy and claim to be the owner of said land, then you are instructed that said acts on the part of the defendant H would constitute adverse possession within the meaning of the law and would entitle the

[15] Cook v. Farrah, 105 Mo. 502, 16 S. W. 692.

[16] Merwin v. Morris, 71 Conn. 564, 42 Atl. 855.

[17] Bartlett v. Secor, 56 Wis. 520, 14 N. W. 714.

defendant to a verdict. But if the defendant, H, has failed to establish any of said acts by a preponderance of the evidence your verdict should be for the plaintiff.[18]

§ 659. **Possession—Acts of ownership not sufficient.**—(1) It is not sufficient to constitute possession that the said K should have occasionally used the property in dispute for the purpose of a printing office during a period of time equal to ten years or more, but such possession, in order to bind the true owner, must have been continuous and unequivocal.[19]

(2) The mere piling up of wood or lumber or rails or offal upon a tract of land or lot, unaccompanied by any other act denoting ownership, is not such possession of the land or lot as would constitute notice to a bona fide purchaser of such tract of land or lot, unless such piling of wood or lumber should constitute, in the estimation of the jury, an open, visible and exclusive possession of the lot in the person piling such wood or lumber.[20]

(3) An occasional use of the land in question, such as the occasional cutting of grass or fire wood, will not be sufficient to constitute or establish adverse possession.[21]

(4) If the plaintiff cut the grass upon a natural fresh meadow, and carried the hay away and converted it to his own use annually for any period of time, however long, without any other possession of the land on which it grew, or any claim of title to the land, such acts alone would not constitute an adverse possession against the true owner of the soil.[22]

§ 660. **Intention must accompany possession.**—(1) Such possession must be under a claim of title or right to the land occupied; or, in other words, the fact of possession and intention with which it was commenced and held are the only tests. If therefore the intention of claiming the title of the land against the true owner is wanting, the possession will not be adverse, and however long continued will not bar the owner's right to recover.[23]

(2) If the defendants during the time they have held the land in dispute only claimed to own the improvements made thereon

[18] Hoffine v. Ewings, 60 Neb. 731, 84 N. W. 93.
[19] Mertens v. Keilman, 79 Mo. 416.
[20] Truesdale v. Ford, 37 Ill. 210.
[21] Merwin v. Morris, 71 Conn. 564, 42 Atl. 855.
[22] Gardner v. Gooch, 48 Me. 489.
[23] Davenport v. Sebring, 52 Iowa, 366, 3 N. W. 403.

then no length of possession will give them title to the land; and, in considering this case, you will take into consideration the acts and declarations of the defendants and their statements of the claim made by them, and if the evidence introduced satisfies you that the claim of the defendants was a claim for improvements only, then you must find for the plaintiffs.[24]

(3) If you believe from the evidence that the defendants purchased the land in controversy from the railroad company, by an assignment of a contract of purchase from one S, and thereby derived the first claim they ever made to the land in question, and afterwards sued and obtained the purchase money paid for said land by their assignor, S, or themselves, by reason of an alleged want of title in said railroad company, then such action on the part of the defendants amounts to an abandonment of all rights claimed or acquired by the defendants in and to the title to the land in question up to the time of receiving such repayments of the purchase money, and their claim of title now made must commence from the date of the receipt of such purchase money, if you find such claim has been made by the defendants.[25]

(4) The question of abandonment is one of fact and intention. Ceasing to cultivate a common field and a removal elsewhere do not make an abandonment; but to constitute an abandonment by the party occupying the premises it must be shown that he quit the property with the intention of making no further claim to the same, and the burden of showing the abandonment rests upon the party who alleges it.[26]

§ 661. Notice to the owner essential.—(1) You cannot presume that the owner of the land in question, in going along the highway where the fence is shown to be nearly on the line, and seeing a fence extending north, has thereby notice that the fence incloses any portion of the land. On the contrary, he is justified in assuming that his neighbor is only inclosing what he is entitled to.[27]

[24] Davenport v. Sebring, 52 Iowa, 366, 3 N. W. 403. See Heinz v. Cramer, 84 Iowa, 499, 51 N. W. 173.

[25] Davenport v. Sebring, 52 Iowa, 364, 3 N. W. 403.

[26] Taylor v. Laden, 33 Mo. 205.

[27] Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 N. W. 737.

(2) The defendant, to make out a title by adverse possession, must show that such possession was adverse in its inception, and where the entry is under the title of the legal owner the holder cannot controvert that title without an express disclaimer or its equivalent, and the assertion of an adverse title with notice to the owner.[28]

(3) The owner need not move to retake possession till he learns or ought to know that his lands are taken possesion of.[29]

§ 662. **Claiming land by color of title.**—(1) The party who relies on adverse possession of land under color or claim of title to defeat the legal right of the owner of the land must show: first, his color or claim of title and that it covers the land or a part of the land in controversy; second, that he entered under said claim or color of title upon said land or some part thereof; third, that his entry was hostile and adverse to the party having the legal title, and was actual, visible and exclusive; and fourth, must have so continued hostile, actual, visible, unbroken under said color or claim of title for ten years before the commencement of the action to dispossess him.[30]

(2) If you find that the plaintiff entered into possession of the land in dispute under the document introduced in evidence as exhibit A, purporting to be signed by R under a claim of ownership, and if you find that he has personally, or by his tenants, continued in possession thereof for more than twenty years, then you must find that he is presumed to have obtained a grant from the state.[31]

(3) If, as claimed by the plaintiff, you shall find that the predecessors of the defendants in the claim of alleged title have admitted the title to be in the predecessors, or any of them, and you so find the title established, then it is not necessary that it shall appear that any possession has been exercised on the part of the owner.[32]

[28] Maxwell v. Cunningham, 50 W. Va. 298, 40 S. E. 499.

[29] Hockmoth v. Des Grand Champs, 71 Mich. 520, 39 N. W. 737.

[30] Maxwell v. Cunningham, 50 W. Va. 298, 40 S. E. 499.

[31] Maxwell v. Cunningham, 50 W. Va. 298, 40 S. E. 499.

[32] Merwin v. Morris, 71 Conn. 564, 42 Atl. 855.

§ 663. **Occupying land without color of title.**—(1) Color of title and claim of title are not, in their strict sense, synonymous terms. To constitute color of title, a paper title—that is, a deed or other instrument purporting to convey title is requisite; but a claim of title may exist wholly in parol, and may be manifested by acts as well as by words, and if you find from the evidence that the defendant S built a house or houses, and barn, and other buildings, dug a well or wells, planted an orchard, and otherwise improved and cultivated the premises in controversy, this is competent evidence tending to show claim of title on part of the defendant upon which an adverse possession may be predicated, and which, if continued for a period of twenty years or more, would bar the plaintiff from maintaining this action.[33]

(2) Where a person enters upon land without a deed or other paper title containing specific descriptions of the land by metes and bounds, or without color of title to the premises, claiming to hold the same adversely, his possession only extends to that part of the land actually improved and occupied by him; and his entry in such case upon a part of the premises does not give him adverse possession to uninclosed and unimproved woodland.[34]

(3) The plaintiff's adverse possession would become perfect with the lapse of ——years, even if he originally had no shadow of title, provided such adverse possession was so open that any other person could bring suit to eject the plaintiff.[35]

§ 664. **Boundary line fixed by agreement.**—(1) It is perfectly competent for parties owning adjoining tracts of land to settle by agreement where the division line shall be; and if the jury shall believe from the evidence that the plaintiff and defendant owned adjoining tracts of land, and any question or dispute had arisen as to where the line now in controversy was, and the plaintiff and defendant agreed upon the line and established it as between themselves, then in that case it is wholly immaterial where a survey would put the line. Each party is bound by his agreement, and in determining whether there was such an agreement and fixing of the line, it is competent for the jury to take

[33] Bartlett v. Secor, 56 Wis. 520, 14 N. W. 714.

[34] Humphries v. Huffman, 33 Ohio St. 97.

[35] Beecher v. Ferris, 112 Mich. 584, 70 N. W. 1106.

into consideration acts and statements of the parties at the time, the acts done by each, and the fixing and adjustment of fences and improvements by them under such agreement, if any such acts or statements are proven.[36]

(2) Before you can find for the defendant on the issue that the survey in the lane dividing the plaintiff's and the defendant's fields has been agreed upon as the division or boundary line between the southeast quarter of the southeast quarter of section twenty-eight and the northeast quarter of the northeast quarter of section thirty-three, you must be satisfied from the evidence that there was a mutual agreement between the owners of the land to that effect.

The fact that F, the former owner, in section thirty-three, erected the south line of fence along the lane and cultivated the lands on the south side of such lane, will not of itself alone be sufficient to prove such consent and agreement. You are further instructed that in determining whether the line which divides the plaintiff's and the defendant's property has or has not been agreed upon between the former owners of adjacent property as the division or boundary line, it is proper that you take into consideration the long acquiescence of adjoining owners to such line of division.[37]

§ **665. Locating the boundary line.**—(1) In questions of boundary, natural objects called for, marked lines and reputed boundaries well established, should be preferred in ascertaining the identity of a tract of land to the courses and distances of the calls of the grant.[38]

(2) If there is any excess in quantity of land in the W survey, such excess is not to be considered by you, whether the same be great or small, unless it enables or assists you to determine the true location of the south boundary line of that survey. You are required to find the true location of the line of survey as originally run and located on the ground, retracing the footsteps of the original survey; and it does not matter whether a

[36] Cutler v. Callison, 72 Ill. 116; Henderson v. Dennis, 177 Ill. 547.

[37] Coleman v. Drane, 116 Mo. 387, 22 S. W. 801.

[38] Reusens v. Lawson, 91 Va. 237, 21 S. E. 347.

greater or less quantity of land than called for in the grant be included within the lines as originally run.[39]

(3) In your deliberations to determine the location of the land described in the Nixon patent, and whether or not it is included in the Davis survey, you will search for the footsteps of the surveyor in locating the Davis survey, and in this search you will be guided first, by natural objects; second, artificial objects, and then by course and distance; yet, in this case, you will investigate all the evidence and follow the actual survey of said Davis as it was made, if, in fact, made by the surveyor, to decide said location of said land described in said Nixon patent with reference to the said Davis survey.[40]

§ 666. **Meander line as the boundary.**—(1) If you find from the evidence in this case that there existed at the time of the government survey and plat of the meander line of the reservation a quantity of upland between the meander line and the channel of Wild Hose creek covered with a natural growth of vegetation, and such tract of land was equal to or greater in area than the adjacent lots lying north of the meander line and claimed by the plaintiff, then you may consider this fact as a circumstance tending to show that the meander line was intended as the south boundary of the lots claimed by the plaintiff, regardless of the location of the creek. The court instructs you that a meander line is a line run by a surveyor for the purpose of determining the sinuosity of the stream and the area of the lots; and where such line in fact meanders the stream, under the laws of this state, the boundary of the lots described would be the center of the channel of the stream, and not the meander line as run on the shore. If, however, you find from the evidence in this case that there is a wide and material divergence between the meander line as run by the surveyor and the north bank of the stream, as it existed at the time of the survey, then I instruct you, as a matter of law, that the meander line as run by the surveyor upon the ground, and not the stream, should be taken as the southern boundary of the lots described in the plaintiff's complaint.[41]

[39] Branch v. Simons (Tex. Cv. App.) 48 S. W. 40.

[40] Mayfield v. Williams, 73 Tex. 508, 11 S. W. 530.

[41] Barnhart v. Ehrhart, 33 Ore. 279, 54 Pac. 195.

§ 667. **By high-water mark.**—(1) The question as to what in law constitutes ordinary high-water mark is the leading question in this case. It therefore becomes necessary to define what the law regards as ordinary high-water mark. It does not mean the height reached by unusual floods, for these usually soon disappear. Neither does it mean the line ordinarily reached by the great annual rises of the river, which cover in places lands that are valuable for agricultural purposes, since the waters brought by these annual rises do not usually remain permanently or for any great length of time, and crops may be raised on the soil as the water subsides. Nor yet does it mean meadow land adjacent to the river, which, when the water leaves it, is adapted to and can be used for grazing or pasturing purposes.[42]

(2) Trees may be included under the general head of vegetation, but trees which grow and flourish best in the immediate vicinity of running streams that are subject to overflow, and which shoot up in places as the water recedes, and which can withstand the effect of water encompassing the lower part of their trunks without injury, and for a longer period than other kinds of trees, should not necessarily be classed as the kind of vegetation to which the law refers as marking the limit of ordinary high water in cases of the character such as the one now on trial, unless the soil on which they grow is adapted to and can be used for agricultural purposes, or so far removed from the effect of high water as to become permanent. You are to say from the evidence before you whether or not the trees mentioned and located in the testimony as growing upon the particular portion of the land, the character of which is, in this action, the subject of dispute. are or are not growing on soil upon which crops may be raised or grass grown suitable for meadow or pasturage, or are so unaffected by high water as to become permanent. It is for you to say whether the soil upon which these trees grow and their location in respect to the river can be used for agricultural purposes, such as the cultivation of crops or as meadow or not. So much of it as you may find susceptible of cultivation and the growing of crops would be above ordinary high-water mark, and not part of the river bed, as would also the groups of trees which

[42] Welch v. Browning, 115 Iowa, 690, 87 N. W. 430.

have stood for many years unaffected by high water, and are permanently fixed in the ground.[43]

§ **668. Accretions along rivers—Ownership.**—(1) Under the law of this state persons owning land on or bounded by the Mississippi river own to the water's edge, and when the water recedes gradually and land is made thereby, the owner of the land bounded by the river is owner of the land so made, and such owner's right to such land remains equal to his river front, and such riparian rights cannot be encroached upon by adjoining owners so running their boundary lines as to diminish such river front or accretions.[44]

(2) The term accretion means portions of the soil added to that already in possession of the owner by a gradual deposit caused by a change in the bed of the river, and such accretion belongs to the owner of the land, and it makes no difference whether the accretions were formed before or after the ownership has accrued and that ownership may be acquired by adverse possession as well as by deed.[45]

(3) If the jury believe from the evidence that the land and premises described in the plaintiff's petition and of which the defendants were in possession at the time of the institution of this suit, were and are not within the boundary line of survey 1922, nor are any part thereof nor are any accretion thereto, but that they are within the original boundary line of Island 73, in Missouri river, and the accretions thereto, and that the defendants held and hold the possession wrongfully from the plaintiff, then they will find for the plaintiff.[46]

(4) Although the jury may believe that Island 73, section six, township forty-four, range one, west, at any time washed away entirely or in part after the same was surveyed and patented by the United States government, yet if they further find that the land in controversy is a reformation of said island on the bed of the river where such island formerly existed, then the plaintiff

[43] Welch v. Browning, 115 Iowa, 690, 87 N. W. 430.

[44] Beene v. Miller, 149 Mo. 234, 50 S. W. 824. See Dashiel v. Harshman, 113 Iowa, 283, 85 N. W. 85.

[45] Beene v. Miller, 149 Mo 234, 50 S. W. 824.

[46] Buse v. Russell, 86 Mo. 212.

is entitled to recover in this action if it be shown that the defendant unlawfully detained the same.[47]

(5) If the jury believe from the evidence that a slough or arm of the Missouri River ran between Island 73 and survey 1922, at the time of making the United States survey, and that since that time the same has been filled up so as to connect the island with the main land and make the island and survey one continuous tract of land, then the adjacent owners of Island 73 and survey 1922 are entitled to the accretions to their respective lands, but if the slough merely filled up from the bottom or by deposits within the bed of said slough, and said accretions did not form on the one side or the other, then the center of the slough as it was before the water deserted it is the boundary between said survey and said islands.[48]

Damages to Realty.

§ 669. **Owner permitting his property to be damaged.**—(1) A person can in no case recover for damages to his business or property which he permits to go on knowing that it is going on, and without making every reasonable effort and taking active steps to prevent it or have it stopped. If you believe from the evidence that the plaintiffs knew their premises were being damaged, and that they permitted the damages to continue when by their own efforts the damage might have been stopped or prevented, then the defendants are not liable for the damage so caused, and the plaintiffs cannot recover in this suit for any such damages.[49]

§ 670. **Excavations on adjacent premises—Liability.**—(1) If you shall believe from the evidence that the house in question was in a ruinous and dilapidated condition before the witness A commenced work upon premises of the defendant adjoining it on the east, and shall not find that by reason of such work it became more ruinous and dilapidated, to an extent which impaired its rental value, then, under the pleadings and all the proof in the

[47] Buse v. Russell, 86 Mo. 213.
[48] Buse v. Russell, 86 Mo. 209.
[49] Hartford D. Co. v. Calkins, 186 Ill. 104, 57 N. E. 863.

cause, the plaintiff cannot recover, and your verdict must be for the defendant.[50]

(2) If you believe from the evidence that the east and south walls of the house in question were in a bad condition before the commencement of the digging by the witness A, under the foundation wall of the defendant's house, and that the settling and cracking thereof were caused by their own inherent defects, and not by the digging by the defendant of his cellar in the year ——, then the plaintiff is not entitled to recover for any injury to her property caused by such settling and cracking.[51]

(3) If you shall find that the work done upon the defendant's premises, by which the house in question is alleged to have been injured, was done by —— under the written contract offered in evidence, and shall further find that a reasonable time before any excavation below the foundation of said house was made the plaintiff was notified or had actual knowledge that such excavation was about to be made, then, under the pleadings and the evidence in the cause, the verdict must be for the defendant.[52]

(4) If you find from the evidence that the defendant in this case removed land adjoining the plaintiff's land in the manner charged in the complaint, then the measure of damages would be the diminution in value of the plaintiff's land.[53]

(5) There is incident to land in its natural condition a right to support from the adjoining land; and if land not subject to artificial pressure sinks or falls away in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measure of damages in such case is not the cost of restoring the land to its former condition or situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support.[54]

§ 671. **Damages from change of grade.**—(1) If the plaintiff sustained any damages by reason of change of grade it occurred

[50] Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918.
[51] Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918.
[52] Bonaparte v. Wiseman, 89 Md. 12, 42 A. 918.
[53] Moellering v. Evans, 121 Ind. 197, 22 N. E. 989.
[54] Moellering v. Evans, 121 Ind. 195, 22 N. E. 989.

at the time the change was made, and in determining the measure of damages by the differences between the value of improvements before the change of grade, and the value of the improvements after the change, you are to consider the values at that time. If you find for the plaintiff in that regard, and having assessed a reasonable and just compensation therefor, you will then consider the question of interest on the amount of damages found for the plaintiff, and on that question, if you find that the plaintiff is entitled to damages, then he should be allowed interest thereon from the date of his damages to his improvements up to the first day of this term.[55]

(2) It is for you to say, taking into consideration all the evidence on the subject, whether, under the circumstances, a retaining wall was reasonably necessary to protect the plaintiff's buildings and improvements, and, if a wall was necessary, then, whether the wall which was constructed was such a retaining wall as was reasonably necessary. And if you find that the wall was reasonably necessary, and the wall constructed was a reasonable one for the purpose, then the plaintiff should recover the fair and reasonable cost of such wall. And if, on this question as to a retaining wall, you find for the plaintiff, then he will be entitled to recover interest on the fair and reasonable cost of the retaining wall from the time of its completion up to the first day of the present term.[56]

§ 672. **Damages from piling filth, dirt.**—(1) If you find from the evidence that the plaintiff is entitled to recover, the true measure of damages for permanent injury is the cost of removing the coal dirt, unless the expense of removal of the same exceeds the value of the entire property, in which case the value of the property is the limit of the measure of damages, and in no event can there be a recovery in excess of the value of the entire property for a permanent injury.[57]

§ 673. **Damages in destroying fences.**—(1) In assessing the actual damages sustained by plaintiffs, if any, the jury should al-

[55] Cincinnati v. Whetstone, 47 Ohio St. 199, 24 N. E. 409.

[56] Cincinnati v. Whetstone, 47 Ohio St. 199, 24 N. E. 409.

[57] Stevenson v. Elbervale Coal Co. 201 Pa. St. 121, 50 Atl. 818.

low such sum as would reasonably be sufficient to pay for material and labor required to rebuild plaintiffs' fence and gates, and place them in as good condition as they were before they were torn down; and in addition thereto they should allow reasonable compensation for the injury to the use of plaintiffs' goods arising out of the defendants' acts for such time as would reasonably be required to rebuild such fence and repair said gates.[58]

(2) If the jury find a verdict for the plaintiffs, they should assess the actual damages sustained by plaintiffs by reason of the taking down and removing of the fence and gates, and if the jury further find from the evidence that the act of the defendants in taking down and removing plaintiffs' fence and gates was malicious, they may assess in favor of plaintiffs and against defendants by way of exemplary damages, in addition to the actual damages. such sum as the jury may believe under all the circumstances to be a just and reasonable punishment for the malicious act.[59]

§ 674. **From diverting flow of surface water.**—(1) The defendant had the right to build its roadbed where it did, and if necessary to its proper construction and use, to throw up the embankment shown to have been made; but, in so doing, it was required by law to construct all the necessary culverts and sluices required by the natural lay of the land to prevent surface water from being diverted from its natural and usual course, and thrown upon land where it would not otherwise have gone.[60]

(2) If you find that plaintiff's said land, within the time hereinbefore stated, was permanently injured, or any of his crops within said time destroyed or injured by water flowing thereon, and said embankment and culverts on defendant's roadbed, by diverting water from its natural and usual course, contributed to such damage, destruction or injury, but that the same was caused in part by water falling and running on said land regardless of said embankment, then defendant would be liable for only such proportion of said injury as was caused by said embankment, and if you so find, and find for plaintiff, you will allow damages herein for only such proportion of the damage covered by said embankment and culverts.[61]

[58] McBeth v. Trabue, 69 Mo. 650.
[59] McBeth v. Trabue, 69 Mo. 650.
[60] Austin & N. W. R Co. v. Anderson, 79 Tex. 428, 15 S. W. 484.
[61] Austin & N. W. R. Co. v. Anderson, 79 Tex. 429, 15 S. W. 484.

(3) If you find from the evidence that the defendant constructed said embankment and culverts, and that between said twenty-second day of September, 1886, and the twenty-second day of September, 1888, during ordinary rains, surface water was thereby diverted from its usual and ordinary course and caused to flow over and upon plaintiff's land, and destroyed or injured plaintiff's crop or crops of corn or cotton, if any he had growing thereon, then you will find for the plaintiff the reasonable value of the crop so destroyed, if any was destroyed, at the time and place of its destruction; and such further sum as will fairly compensate him for the injury, if any thereby caused, to any of said crops not destroyed; allowing for only such injury as was caused by said embankment and culvert causing water to flow on said land which otherwise would not have flowed there.[62]

§ 675. Dam injured by bridge washing out through negligence.—(1) The court instructs the jury that, if they find that on the third day of August, 1885, the plaintiffs were the owners of the property situated on Deer Creek, described in the deed from P offered in evidence, with buildings and mill-dam as part thereof, and which has existed for over thirty years, and that up to the year 1883 the stream was crossed by the county road at a ford below the dam, and that about that year the defendants changed the location of the county road so as to cross the stream by an iron bridge set upon abutments connected by wing walls with the banks on either side of the stream, and if the jury shall believe from the evidence that said abutments, or either of them, were improperly and insecurely erected for the purposes for which they were designed, and that, in building said abutments, they were not built as high or with such space between as was reasonably necessary in times of freshet, and that, owing to such defective construction (if they find such) or insufficient space provided for venting the water one of said abutments gave way, and the bridge was carried off on the third day of August, 1885, and was lodged upon the plaintiffs' mill-dam, and that thereby said mill-dam was washed out and injuries sustained by the said mill and by the washing away of their buildings, then the plaintiffs are entitled to

[62] Austin & N. W. R. Co. v. Anderson, 79 Tex. 428, 15 S. W. 484.

recover the losses occasioned thereby and sustained by them in the destruction of their property and business, notwithstanding the jury may be of the opinion that the water at the time was higher than usual in times of freshet.[63]

(2) If the jury find that the bridge above Millford was carried away by a flood on the third day of August, 1885, and in passing down the stream carried away plaintiffs' dam, then plaintiffs are entitled to recover such sum as will compensate them for the injury sustained and loss suffered, provided the jury also find that the location, construction or condition of the bridge was negligent, and that the carrying away of the bridge was in consequence of such location, construction or condition.[64]

Damage by Animals.

§ **676. Horses and cattle destroying crops, liability.**—(1) If you find from the evidence that the fence, through or over which the stock of the defendant entered on the land of the plaintiff, was a partition fence, dividing the lands of the parties to this suit, and that the defendant's stock crossed over said fence at a place where it was the duty of the plaintiff to maintain said fence, then the defendant would not be liable in this case, unless the plaintiff has shown by the testimony of skillful men that the fence was such as good husbandmen generally keep.[65]

(2) If you find that the plaintiff could, by the use of ordinary care, have prevented the horses and cattle from eating and destroying his hay and corn, he cannot recover for such hay and corn thus destroyed, which by ordinary diligence he might have prevented. The plaintiff, after he knew the horses and cattle of others were destroying his hay and corn, should have used reasonable caution to have prevented further injury, such as fencing his stacks, and fencing his corn beyond the reach of such stock, provided he could reasonably have done so.[66]

[63] County Com'rs of Hartford Co. v. Wise, 71 Ind. 43.

[64] County Comrs. of Hartford Co. v. Wise, 71 Ind. 43.

[65] Hinshaw v. Gilpin, 64 Ind. 116.

[66] Little v. McGuire, 38 Iowa, 562.

(3) If you find from the evidence that the defendant's fence, with the exception of one or two small gaps, was sufficient to have turned the stock, and find that the plaintiff knew of these gaps, and that the stock would come through such gaps, and after knowing such facts, and knowing that the stock did come through said gaps, and if you find that the plaintiff, with the exercise of ordinary care, could have prevented said stock from thus trespassing, and did not do so, he cannot recover for the damage which he might have thus prevented.[67]

(4) A man has no right to carelessly look on at the destruction of his property. It is his duty to use reasonable care to prevent such destruction; and if he fails to use ordinary care he cannot recover for the injury which, by ordinary care, he might have prevented.[68]

§ 677. **Measure of damages for injury to crops.**—(1) The measure of plaintiff's damage for the loss or injury to the grass for the years 1886 and 1887, if you find that he has sustained any damages in that regard, will be the actual damage done to the grass and crop for these years by the defendant's cattle; that is the difference between the actual market value of the crop upon the land for those years as it was, and what its market value would have been had the plaintiff's cattle not been driven or herded or pastured upon the land. To state it in other words, the question for you to determine from the evidence, in fixing the amount of damages, if any, on this claim, is, how much less was the actual rental value of the land for the grass crop of these years by reason of the defendant's cattle having been driven or herded upon the land than it would have been had the cattle not been driven or herded upon the land? If you find that the plaintiff is entitled to recover in this case you will ascertain whether he has sustained any damages by reason of any permanent injury to the growth of grass on said land. The plaintiff's damages upon this claim, if he is entitled to recover any, will be such only as injuriously affect the market value of the land.[69]

§ 678. **Submitting facts to the jury on injury to crops.**—(1) The plaintiff claims that his crop was destroyed by defendant's

[67] Little v. McGuire, 38 Iowa, 561.
[68] Little v. McGuire, 38 Iowa, 562.
[69] Harrison v. Adamson, 86 Iowa, 695, 53 N. W. 334.

cattle. It is important that you determine whether the crop was destroyed by defendant's cattle; whether plaintiff's fence was a lawful fence, four and a half feet high, with spaces sufficiently close; was the fence four and a half feet high, and such as is generally, in this country, recognized as a good fence? This is a matter entirely in your discretion. You will then inquire whether defendant's cattle broke into plaintiff's field and destroyed his crop; and if you find that the fence was such a one as comes within the meaning of the law, and such a one as is recognized as a good common fence in the country, and the defendant's cattle broke through the inclosure, the defendant is liable for all damages resulting from such breach. In such case, it was the duty of the defendant to keep his cattle up, and not suffer them to run at large to the danger of his neighbor's property; and if property was destroyed he would be responsible. No man has the right to suffer to run at large animals of a dangerous kind, either to the person or property of another; and if he does, he is responsible for all damages which result from the acts of such animals. But if the fence was not a reasonable one, such as would be calculated to protect the property, the crop, and the loss was the consequence of the negligence of plaintiff, and that by ordinary care and prudence he could have protected the crops, it was his duty to do so; and if he failed to do so, and the fence was such as the custom of the country and the law would not recognize as a lawful fence, he would not be entitled to recover; the loss would be a consequence of his own negligence and fault.[70]

Damages by Nuisance.

§ 679. **Residence, health, business, injury to.**—(1) If you find from the evidence that the personal enjoyment of the plaintiffs in their residence has been, and will be, materially and essentially lessened by either the noise, smoke, dirt, dust, cinders, horses, mules or teams, caused by the running and using of said mill, then the allegations of the complaint have been sustained.[71]

(2) The defendants are entitled to use their property for any

[70] McManus v. Finan, 4 Iowa, 285.

[71] Owen v. Phillips, 73 Ind. 287. See "Nuisance" under criminal law.

lawful purpose or business, though it may be in a slight degree inconvenient or unpleasant to the owners of the adjoining property, and, to entitle the adjoining owners to suppress such works, they must show such business is injurious to life or health, or emits such noisome smells as would render the plaintiff's property unfit for occupation.[72]

(3) If the defendants are guilty of maintaining a nuisance by obstructing the public highway, as claimed, and if the jury find that the effect thereof was to prevent the free ingress and egress to the plaintiff's place of business, and that this caused to the plaintiff a loss of trade and custom in his business as a merchant, then the defendant would be liable therefor.[73]

§ 680. **Plaintiff must prove a nuisance; mere injury insufficient.**—(1) The plaintiff cannot recover unless the jury should be satisfied from the evidence that the leadworks, or shot-tower, as conducted by the defendants, was either a common or private nuisance.[74]

(2) The mere fact that the plaintiff's wife, or himself, or his children, suffered from lead or arsenical poisoning, is not sufficient to enable the plaintiff to recover; but the plaintiff must prove that such poisoning was caused by the operation of either the shot-tower or the leadworks by the defendants.[75]

(3) In determining this case, the jury should remember that the plaintiff does not claim that either the leadworks or the shot-tower was run by defendants in a negligent manner; and should the jury think that the said works, run in an ordinarily careful and skillful manner, would not be a nuisance, either public or private, the plaintiff could not recover, even though the jury should also think that, by some carelessness or negligence of defendant's employes at the time of the fire, or at some other time, the plaintiff or his family were hurt.[76]

(4) The burden of proof is upon the plaintiff to show, first, that the defendants were guilty of maintaining a private nuisance in the operating of a shot-tower or leadworks; and second, that, as a result from such operation, he, the plaintiff, suffered

[72] Price v. Grautz, 118 Pa. St. 406, 11 Atl. 794.

[73] Park v. Chicago & S. W. R. Co. 43 Iowa, 636.

[74] Price v. Grautz, 118 Pa. St. 406, 11 Atl. 794.

[75] Price v. Grautz, 118 Pa. St. 406, 11 Atl. 794.

[76] Price v. Grautz, 118 Pa. St. 407, 11 Atl. 794.

injury, and a failure on the part of the plaintiff to prove both of these propositions to the satisfaction of the jury would prevent a recovery.[77]

§ 681. Purchasing property in factory locality, no liability.—(1) If the jury find from the evidence that, at the time the plaintiff acquired the property mentioned in the evidence, and erected thereon the improvements mentioned in the evidence, there was already erected and in operation on the adjacent lot a fertilizer factory which would use the same agents and from which were emitted the like gases and emanations that were used in and emanated from the factory of the defendant, and producing like effects; and that said factory afterwards passed into the possession of, and was operated by, the defendant, as it had been operated before, and if they shall further find that when plaintiff acquired and improved his said property, and prior thereto, there was established and operated in the same locality factories similar to that of the defendant, from which like emanations producing like results proceeded; and that said factories employed large numbers of men and produced merchandise of great value; and that the plaintiff was aware of the existence of said factories, and that he so acquired and improved his said property; and if they shall further find that the factory of defendant was in a suitable and proper place, with a view to the convenience, welfare and comfort of the public; and if they shall further find that the damage and injury suffered by the plaintiff were only such as are incident to the proximity of such a business as that of the defendant in that locality, and were not unreasonable or excessive in view of the location and all of the circumstances of the case, then plaintiff is not entitled to recover in this action.[78]

§ 682. Using premises as a pest house.—The measure of damages in a case of this kind will be what you believe, from the evidence, would be the fair and reasonable rental value of that property for the purpose for which it was taken and used. It is what damages the property sustained by reason of having been used for a pest house. And you must arrive at the measure of damages—ascertain the measure of damages—from the evidence, not from

[77] Price v. Grautz, 118 Pa. St. 405, 11 Atl. 794.

[78] Susquehana F. Co. v. Malone, 73 Md. 268, 20 Atl. 900.

any preconceived notions of your own, but from the evidence brought out upon the trial, and from that come to your conclusion.[79]

Eminent Domain—Condemnation.

§ 683. Highest and best use in estimating damages.—(1) The owner of the land is entitled to the use and enjoyment of the same for the highest and best use to which it is adapted, and if you find from all the evidence that a large portion of the Milroy farm is, by the proposed railroad, cut off from the water supply, and the several parts rendered inconvenient of access, so that the whole farm is depreciated in market value and damaged for all time, then you should take such facts into consideration in estimating the damages.[80]

(2) That in fixing the amount of compensation to be paid to the defendants, severally, you should take into consideration the use for which the property is suitable and to which it is adapted, having regard for its situation and the business wants of that locality, or such as may reasonably be expected in the near future, so far as the same appears from the evidence, and so far as the same affects the market value on September 14, 1896.[81]

(3) The true measure of compensation for the property to be condemned is the market value of the same, but reference may be had, not merely to the uses to which the land is actually applied, but its capacity for other uses, so far as the same may be shown in evidence, may also be considered.[82]

(4) In determining the fair cash market value of the property sought to be condemned in this case, you have a right to take into consideration, and should take into consideration, all the purposes for which said property is adapted and is used, or may be used, so far as such adaptation and uses are shown by the evidence or by your view of the said premises, so far as the same may have affected the market value on September 14, 1896.[83]

[79] Brown v. Pierce County, 28 Wash. 345, 68 Pac. 872.

[80] Galesburg & G. E. R. Co. v. Milroy, 181 Ill. 243, 246, 54 N. E. 939. See Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 549, 51 N. E. 572.

[81] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 550, 51 N. E. 572.

[82] Chicago, E. & L. S. R. Co. v. Catholic Bishop, &c. 119 Ill. 528, 10 N. E. 372.

[83] Rock I. & P. R. Co. v. Leisy

(5) The jury are instructed that they are to ascertain from the evidence, after their own view of the property sought to be taken, and also the damages, if any have been proven, to the property from which the strip is to be taken. And if the jury believe from the evidence that the property occupied by the ice company, in its present condition, has a special capacity, as an entirety, for the purposes of ice-freezing, cutting and transporting, and as an entirety is devoted to such purposes, and that the value of such tract will be depreciated and lessened by the taking of the strip in question, then the owners of the property are entitled to recover a sum equal to such depreciation in value.[84]

§ 684. **Damages based upon market value.**—(1) The damages allowed to the plaintiff must not in any case exceed the market value of his premises when the railroad was constructed.[85]

(2) The measure of these damages is the difference between the annual value of plaintiff's premises with the railroad constructed and operated as it was, and what such annual value would have been had not the railroad been on said street during that time; and that in determining such diminution in the annual value they may consider the manner in which the road was built along said street in front of said premises, the manner in which and the extent to which it was used and occupied at that place by defendant's cars and locomotives, the situation of the premises in reference to that portion of the road and the effect which defendant's occupation and use of that portion of the road had upon the reasonable use and enjoyment of the premises and of the improvements thereon.[86]

(3) In no event must the damages exceed the sum which would be obtained by determining the difference between the annual rental value of the property with the railroad constructed and operated as it was, and what that value would have been if there had been no railroad on P Street during that time.[87]

Brewing Co. 174 Ill. 547, 51 N. E. 572. Verdict should not be based on facts observed in viewing the place: Pittsburg, &c. R. Co. v. Swinney, 59 Ind. 100; Heady v. Vevay, &c. Co. 52 Ind. 117.

[84] Village of Hyde Park v. Washington Ice Co. 117 Ill. 233, 7 N. E. 523.

[85] Blesch v. Chicago & N. W. R. Co. 48 Wis. 172, 2 N. W. 113.

[86] Blesch v. Chicago & N. W. R. Co. 48 Wis. 170, 2 N. W. 113.

[87] Blesch v. Chicago & N. W. R. Co. 48 Wis. 171, 2 N. W. 113.

(4) At the time of the construction of the road plaintiff had a vested private right of free access to and egress from his said lots and the buildings thereon, over and along Pearl street in front of the lots, "as the same was and would have continued to be according to the mode of its original use and appropriation by the public;" that this was a right of property which could not be materially impaired or destroyed without plaintiff's consent, except upon payment to him of due compensation; and therefore, if defendant's road changed the mode of the original use of the highway, or if it was thereby appropriated by the public to new vehicles and methods of transportation, so as to materially impair plaintiff's said right, he was entitled to recover such damages as would compensate him for the injury.[88]

(5) If defendant's said right of property was materially impaired, the jury must allow him the damages resulting therefrom from the date of the building of the road in front of his premises until the commencement of the action.[89]

§ 685. **Considerations in determining market value.**—(1) If you find from the evidence that the plaintiff's farm consisted of about —— acres of improved lands, and the right of way of defendant cut the same in such a manner as to injure the value of the same by throwing it open and dividing it into pieces, you are at liberty to consider such circumstances and the effect upon the land, if any, by reason of the location upon the land of the railroad, and of the inconvenience directly caused by the railway, in determining the effect the same would have upon the market value of the lands, and it is the depreciation in the market value of the premises which is the true measure of damages, and which you are to allow for, and not the matters which would cause such depreciation.[90]

(2) If the construction and operation of the defendant's road in front of the plaintiff's premises has depreciated their annual value, the jury cannot apportion the damages for these injuries according to the width of the strip actually taken and occupied, but must award damages to compensate the plaintiff for the whole amount of injuries sustained.[91]

[88] Blesch v. Chicago & N. W. R. Co. 48 Wis. 170, 2 N. W. 113.

[89] Blesch v. Chicago & N. W. R. Co. 48 Wis. 170, 2 N. W. 113.

[90] Hartshorn v. Burlington, C. R. & N. R. Co. 52 Iowa, 616, 3 N. W. 648.

[91] Blesch v. Chicago & N. W. R. Co. 48 Wis. 171, 2 N. W. 113.

(3) The plaintiff had a right to put any lawful improvements on the property after the railroad was built on his land, in the street; and if, after such improvements were made, they are to be considered in determining the subsequent rental value of the premises.[92]

(4) In this case it is proper for you to take into consideration the proximity of this land to and its contact with the city of ——. And it is proper for you to take into consideration any fact which may tend to add a value to that land. If any part of it was then valuable as building lots, and that fact added a value to the land, it is proper for you to take that into consideration, and if the location and construction of the defendant's railroad across this land destroyed it in part, or took away any part of this land which might have had, or had value for that purpose, it is proper for you to take that fact into consideration. It is not proper for you, in determining the value, or the amount of damages sustained by the plaintiff, to take the estimate of any one as to how many lots might be laid out upon the premises, and what these lots might have sold for in the event of their being sold. That would be fixing a measure of damages not as of the date of entry, but as of a future time, but your duty is to fix the measure of the damages sustained by the plaintiff at the time of the entry, and, as we have said, anything that then added value to the land, and any injury then sustained, must be taken into consideration by you.[93]

(5) The interruption of plaintiff in the use and cultivation of his land, or any inconvenience he may have been put to in its cultivation and use as a live stock farm, or otherwise, according to his peculiar taste in farming, since the appropriation of the right of way, if any, cannot be considered by the jury as forming an element of damages in his favor, and your inquiry must be confined to the marketable value of plaintiff's land before and after the right of way was appropriated, taking into account, in this connection, the number of acres taken for the right of way, the manner of its location, the way his land is cut by the railroad, and the like, so as to be able to estimate the true market value of his land, affected by the location of the railroad before and after such location; the difference in the market value of the land affected by

[92] Blesch v. Chicago & N. W. R. Co. 48 Wis. 171, 2 N. W. 113.

[93] Reiber v. Butler & P. R. Co. 201 Pa. 49, 50 Atl. 311.

the appropriation of the strip for the right of way before, and then again after the right of way is asserted, will form or constitute his true measure of damages.[94]

(6) In assessing the damages to the market value of the property not taken, you should not take into consideration anything as an element of damages which is remote, or imaginary, or uncertain, or speculative, even though mentioned or testified about by the witnesses; but the only elements which you should take into consideration, as tending to reduce the market value, are those elements which are appreciable and substantial, and which will actually lessen the market value of said property.[95]

§ 686. Value of lots fronting on navigable streams.—(1) That the owners, severally, of the lots fronting on the Illinois river, and here sought to be condemned, own to the middle thread of the stream, subject only to the right of the public to use the navigable portions thereof for the purposes of navigation. Such owners have also the exclusive right to any and all ice forming on said river in front of their lots, respectively, to the middle thread of the stream, and may themselves cut and remove the same, or sell such ice to another with the exclusive right to harvest it.[96]

(2) The jury are further instructed that, as owners of lands fronting upon and bounded by a navigable stream, the defendants in this case, subject to the rights of the public in such navigable stream, own their several lots to the middle of the stream, and the said defendants, as such lot owners, have the right to use and enjoy their several lots by building docks and wharves thereon, or by filling in the same with earth or other solid material to any extent whatever, so long as they do not interfere with the rights of navigation by the public in such stream.[97]

(3) That the owner of lands or lots fronting upon a navigable stream, and of which lands or lots such stream forms one of the boundary lines, has a lawful right to erect docks and wharves conforming to such boundary line, in and along said stream, conforming, however, to the regulations of the proper public authori-

[94] Hartshorn v. Burlington, C. R. & N. R. Co. 52 Iowa, 616, 3 N. W. 648.

[95] Kiernan v. Chicago, Santa Fe & C. R. Co. 123 Ill. 188, 195, 14 N. E. 18.

[96] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 551, 51 N. E. 572.

[97] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 547, 51 N. E. 572.

ties for the protection of the public rights in such stream; and such owner may so place such docks and wharves as to have the benefit of the navigable part of such stream, but not interfering with the public rights of navigation.[98]

(4) That if you find from the evidence in this case that the lots in question, or any of them, are susceptible of enlargement and extension by filling, thus giving increased areas for any use to which the property may be put, then you have a right to take that into account in arriving at your verdict, and give such fact the weight which, in your judgment, it is entitled to receive, so far as the same affected their market value on September 14, 1896.[99]

(5) The defendants in this case are each entitled to the fair cash value on the fourteenth day of September, 1896, of their respective lots sought to be taken, regardless of the causes which gave them value at that time. If the jury believe from the evidence in the case, including their own view, that the value of said lots, or any of them, on that day, was owing, in whole or in part, to the projection by the plaintiff of the improvement to its railroad facilities, for which it seeks to condemn said lots, still the owners of said lots are entitled to the fair cash market value of said lots as they then stood.[100]

§ 687. **Benefits shall be deducted from damages.**—(1) If the plaintiff enjoyed any peculiar benefits from the railroad being on this street, such benefits must be deducted from his damages; but that benefits common to the whole community are not to be considered.[101]

§ 688. **Witnesses magnifying value—Credibility.**—(1) That if you believe from the entire testimony, and from your inspection of the premises, that any witness has magnified or exaggerated the value of the land taken or the damages to the land not taken, on account of his interest in the suit, or his prejudice, or want of knowledge, or experience, or truthfulness, then you have the

[98] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 550, 51 N. E. 572.

[99] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 550, 51 N. E. 572.

[100] Rock I. & P. R. Co. v. Leisy Brewing Co. 174 Ill. 549, 51 N. E. 572.

[101] Blesch v. Chicago & N. W. R. Co. 48 Wis. 172, 2 N. W. 113.

right, and it is your duty, to disregard the evidence of such witness in so far as the same is unjustly magnified or unjustly increased, either as to the value of the land taken or the damages to the property of the defendant not taken.[102]

Taxes on Realty.

§ 689. **Land unlawfully sold for taxes—Certificate void.**—(1) If you find that the purchaser and holder of the certificate prior to the time of the alleged sale made a private bargain with the treasurer by which he was to take the lands, and that, in pursuance of such private arrangement, a certificate was made out to him, without said lands ever having been offered publicly, so that competition was or could have been had, and that it was essentially and entirely private, there then was no public sale, or such a sale as would convey to the alleged purchaser the title to the same. And if you find the facts to be that there was no sale, and that the defendants had title to the land at the time of the alleged sale, or that their grantor did, then you will find for the defendants.[103]

(2) Upon the question of the title of the defendants, you are instructed that it is sufficient if you find that they were in possession of the same, and as a matter of right were entitled to such possession, with such an interest and right as could be enforced, even though the same may have been defective by reason of the loss of a deed or other defect. If they or their grantors were, in fact, the owners of the land, it is sufficient, even though their claim of title is shown to have been at the time of the alleged sale deficient.[104]

§ 690. **Listing land on books for assessment.**—(1) If a person has his land charged upon the land books in a large tract that covers all his smaller tracts, it is not necessary for him to have it charged to him in the smaller tracts; and no forfeiture can

[102] Kiernan v. Chicago Santa Fe & C. R. Co. 123 Ill. 188, 197, 14 N. E. 18.

[103] Chandler v. Keeler, 46 Iowa, 599.

[104] Chandler v. Keeler, 46 Iowa, 598.

accrue to those small tracts by reason of their not being so charged as small tracts if they are included in the large tracts. In other words, coterminous tracts of land belonging to the same person, for the assessment and payment of taxes, are the same as one tract,[105]

§ 691. Forfeitures are odious and must be strictly proved.—(1) Forfeitures are deemed odious in law, and will never be presumed, but must be strictly proved by the party relying on the same. And before the defendants can have the benefit of the forfeiture claimed by them, or any of them, for a failure of the plaintiffs, or those under whom they claim to have had the land in controversy placed upon the land books in R. county, and pay the taxes thereon for five successive years after the year 1869, the defendants must clearly prove that the said land, or any part thereof in controversy, has not been upon the land books for those years, neither in large tracts nor small ones.[106]

[105] Maxwell v. Cunningham, 50 W. Va. 301, 40 S. E. 499.

[106] Maxwell v. Cunningham, 50 W. Va. 301, 40 S. E. 499.

CHAPTER XLV.

WILLS.

Sec.		Sec.	
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693.	Statutory requirements in attesting wills.	701.	Considerations in determining mental state.
694.	Mental capacity to make will, essential.	702.	Testimony of medical experts on mental state.
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696.	Maker of will presumed of sound mind.	704.	"Undue influence" used in procuring will.
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698.	Insanity is disease of brain affecting the mind.	706.	Will presumed genuine—Not forgery.
699.	Mental weakness will not disqualify.		

§ **692. Person making will may disinherit relatives.**—(1) Every person being twenty-one years of age and upwards, and of sound mind and memory, has a right to make a disposition of his estate by will, and to so divide his property as to divest those who would otherwise inherit it as his legal heirs of their interest therein. Generally the object of a last will and testament is to enable a testator to divide and distribute his property as to him may seem best, and no next of kin, no matter how near they may be, can be said to have any legal or natural right to the estate of a testator which can be asserted against the will of the latter. The law of this state has placed every person's estate, over twenty-one years of age, wholly under the control of the owner, and to be devised and distributed by the latter as he may freely choose and direct

in the last will and testament made by him. Neither children nor grandchildren have any natural rights to the estate of their mother or grandmother which can be asserted against any disposition of said estate which said mother or grandmother may choose to make by will.[1]

(2) A person competent to make a will may disinherit all his children, and bestow all his property upon strangers, or he may give his property to one or more of his children and disinherit the others, or he may bequeath more of his property to some than to others of his children, and the motive for so doing cannot be questioned, and the hardship of the case can have no other weight further than a circumstance, tending, with other testimony, to show the insanity of the testator. It is a question of fact for the jury to determine, from the evidence in the case, whether L made an unequal or unnatural disposition of his estate; if he did so, the weight to be given to that fact must be determined from a consideration of the circumstances in the case.

In determining the true character of the will in question, in reference to the parties to this suit, it will be proper for you to consider the pecuniary circumstances of the respective parties at the time the will was made. If, upon a full consideration of all the circumstances connected with the making of this will, you find that the testator has made a rational and reasonable disposition of his property, no presumption of unsoundness of mind can be drawn from the fact that he bestowed a larger share of his property upon the defendants than upon the plaintiffs. It is proper for the jury to consider, with this part of the case, any declaration which may have been made by the testator prior to the making of the will, in regard to the disposition he intended to make of his property. And if it should be found that, when he was in good

[1] Taylor v. Cox, 153 Ill. 228, 38 N. E. 656. Held proper where it does not appear that the testator had any creditors. The statute of Illinois provides "that every male person of the age of twenty-one years, and every female of the age of eighteen years, being of sound mind and memory, shall have power to devise all the estate, right, title and interest in possession, reversion or remainder, which he or she hath, at the time of his or her death shall have, of, in and to any lands, tenements, hereditaments, annuities, or rents charged upon or issuing out of them, or goods and chattels, and personal estate of every description whatsoever, by will or testament."

Ill. Stat. Chap. 148, § 1, "Wills."

health, in writing or otherwise, he declared his intention to dispose of his property substantially in the same manner it is disposed of in the will in suit, it is an important fact to be considered in determining the validity of this will and as tending to its support.[2]

(3) The owner of property, who has the capacity to attend to his ordinary business, has the lawful right to dispose of it, either by deed or by will, as he may choose, and it requires no greater mental capacity to make a valid will than to make a valid deed. And if such owner chooses to disinherit his heir, or leave his property to some charitable object, he has a legal right to do so, and such disposition of his property is valid, whether it be reasonable or unreasonable, just or unjust; and the reasonableness, or justice, or propriety of the will are not questions for the jury to pass upon. If, therefore, the jury believe from the evidence that, when he executed the paper in dispute, Isaac Foreman had capacity enough to attend to his ordinary business, and to know and understand the business he was engaged in, then he had the right and the capacity to make such will, and the jury should find the paper in dispute to be the will of said Foreman. The court instructs the jury that, even if they find from the evidence that Isaac Foreman had, during some portions of his life, eccentricities or peculiarities, or even an insane delusion, or partial insanity on the subjects of religion, or masonry, or education, or any other subject, yet if they find from the evidence that, at the time he made the will in question, he had sufficient mind and memory to understand his ordinary business, and that he knew and understood the business he was engaged in, and intended to make such a will, the jury should find said will to be the will of said Isaac Foreman.[3]

§ 693. **Statutory requirements in attesting wills.**—(1) In this state it is provided by statute that any person of full age and sound mind may execute a will, which, to be valid, must be in writing, witnessed by two competent witnesses, and signed by

[2] Lamb v. Lamb, 105 Ind. 460, 5 N. E. 171.

[3] American Bible Soc. v. Price, 115 Ill. 623, 633, 5 N. E. 126. As to the effect of evidence of eccentricities and delusions on testamentary capacity, see Wait v. Westfall, 161 Ind. 648, 68 N. E. 271.

the testator, or by some person in his presence, and by his express direction.[4]

(2) The statute requires that a will, to be valid, must be in writing, signed by the testator, or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses. An attesting witness is one who subscribes his name to the will as a witness to its execution at the request of the testator. Such request by the testator is a part of the testamentary act, and must be performed by the testator. A person who signs or subscribes his name to a will without being requested to do so by the testator is a mere volunteer, and not an attesting witness, in contemplation of law. You are to determine from the evidence whether or not at least two of the witnesses whose names are signed to the will as witnesses signed the same at the request of the testator. If you find from the evidence that any two of said witnesses subscribed their names to the will as witnesses at the request of the testator, and in his presence, then the will is duly attested as required by law; but if you find that at least two of said subscribing witnesses did not sign their names to said will at the request of the testator, then said will was, and is, not duly executed, and in that event you should find for the plaintiff.[5]

(3) Any person of full age and sound mind may execute a will, which, to be valid, must be in writing, witnessed by two competent witnesses, and signed by the testator or by some person for him in his presence, and by his express direction. An attesting witness is one who subscribes his name to the will as a witness to its execution at the request of the testator. Such request of the testator is a part of the testamentary act, and must be performed by the testator. A person who signs or subscribes his name to a will without being requested to do so by the testator is a mere volunteer, and not an attesting witness in contemplation of law.[6]

(4) Relative to the witnessing or attestation of the alleged will in question, the court instructs the jury that the statute of Illinois provides that all wills shall be attested, in the presence of the testator, by two or more credible witnesses; and if you believe

[4] Matter of Convey Will, 52 Iowa, 198, 2 N. 1084.

[5] Bundy v. McKnight, 48 Ind. 505.

[6] Matter of Convey Will, 52 Iowa, 198, 2 N. W. 1084; Bundy v. McKnight, 48 Ind. 505.

from the evidence that William Drury signed the alleged will in question in the presence of Arthur W. Mannon and Richard H. Roberts, and after he so signed the same they took said will to a writing desk a short distance from the foot of the bed, and within the range of the testator's vision, and that the said William Drury was sitting on the bed, and they there subscribed their names to the attestation clause of said alleged will in full and uninterrupted view of the said testator, then this is sufficient attestation of the will in question, and a full compliance with the law on the subject.[7]

(5) If you believe from the evidence that at the time of the alleged attestation of William Drury's alleged will, now in dispute, that the alleged witnesses were in the same room with said William Drury, and only a few feet from him, with the view between him and them uninterrupted, and they within the range of his vision; and if you further believe from the evidence, and the then surrounding circumstances proven on the trial, in connection with the alleged attestation of said alleged will, that said William Drury, taking into account his then condition or state of health, and his then position as shown by the evidence, either saw, or could have seen, if he had wished to, and had looked in the proper direction, the alleged witnesses themselves, and enough of the act then being done by them to know on his part (from what he so saw, or might have seen if he had wished, and from what he knew of the then surrounding circumstances) that the alleged witnesses were then signing their names as witnesses to his, William Drury's, will, then upon that question you should find the alleged will in question to have been properly attested.[8]

(6) To make a legal attestation to a will the test is, was there an uninterrupted view between the alleged testator and the subscribing witnesses, and were the witnesses within the range of the alleged testator's vision (his then condition as to health and posture being considered) when the alleged attesting was done? Was the alleged will then present, and could the alleged testator, in his then condition and posture, have seen if he had wished to, and had looked in the proper direction, enough of the persons of the

[7] Drury v. Connell, 177 Ill. 43, 52 N. E. 368.

[8] Drury v. Connell, 177 Ill. 43, 52 N. E. 368.

alleged witnesses, and enough of the act then being done by them, to know on his part (from what he could have seen if he had wished to, and from what he knew of the then surrounding circumstances) that the alleged witnesses were then signing their names as witnesses to the alleged testator's proposed will.[9]

(7) While the presumption of the law is that, where a will is signed by the attesting witnesses in the same room with the testator, that it is signed in his presence, yet that is only a presumption; and where the evidence shows that the witnesses were in such position that the testator could not see the paper, nor see the witnesses when signing it, the presumption of law is overcome.[10]

§ 694. **Mental capacity to make will essential.**—(1) It is only requisite that a testator, at the time of making his will, should be of such sound mind and memory as to enable him to know and understand the business in which he is engaged. It is not necessary that he should be in the full possession of his reasoning faculties.[11]

(2) If the jury believe from the evidence that Isaac Foreman, at the time he signed the paper in dispute, had mind and memory sufficient to transact his ordinary business, and that when he made the will he knew and understood the business he was engaged in, then the jury should find said paper writing to be the will of said Foreman.[12]

(3) Aside from the requisite formalities in the making of a will, the law defines the requisite soundness or mental capacity of the testator in this wise: A will is not valid unless the testator not only intends of his own free will to make such a disposition, but is capable of knowing what he is doing and of understanding to whom he gives his property, and in what proportions, and whom he is depriving of it as heirs or as devisees under the will he makes.[13]

(4) In order to make a valid will it is necessary that the decedent should be of sound mind at the time of the making of the will; that he was capable of comprehending his property in-

[9] Drury v. Connell, 177 Ill. 43, 46, 52 N. E. 368.

[10] Drury v Connell, 177 Ill. 43, 52 N. E. 368.

[11] Dyer v. Dyer, 87 Ind. 18, citing Redf's Wills, 64; Converse v. Converse, 21 Vt. 168.

[12] American Bible Soc. v. Price, 115 Ill. 623, 633, 5 N. E. 126.

[13] McGinnis v. Kempsey, 27 Mich. 364.

terests and determining what disposition he desired to make of such interests, and of making such disposition. And by this it is not meant that he must possess the intellectual vigor of youth, or that usually enjoyed by him while in perfect health. It is enough that, as above stated, he was capable of comprehending his property interests of which he was possessed, and of determining what disposition he desired to make of such property, and of making such disposition.[14]

(5) In order to make a valid will it is only necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and possessing this, though he may be feeble in mind and body from sickness or old age, he has the legal right to dispose of his property just as he pleases, without consulting either his family or his acquaintances. And if the jury believe from the evidence that, when he executed the paper in dispute, Isaac Foreman knew what he was doing, and executed it as his will, understanding its nature and effect, and that at the time he had sufficient mind and memory to transact his ordinary business, such as buying or selling or renting property, or collecting or paying out money, or settling accounts, then the jury should find the paper in dispute to be the last will and testament of said Isaac Foreman.[15]

(6) It is only requisite that the testator, at the time of making his will, should be of such sound mind and memory as to enable him to know and understand the business in which he is engaged. It is not necessary that he should be in the full possession of his reasoning faculties. It is only necessary that the testator shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and, possessing this, though he may be feeble in mind and body from sickness or old age, he has the legal right to dispose of his property just as he pleases, without consulting either his family or acquaintances. And in this case, if you believe from the evidence that F, at the time he signed the paper in dispute, had mind and memory sufficient to transact his ordinary business, and that, when he made the will, he knew and understood the business he was engaged in, then you should find said paper writing to be his will.[16]

[14] Webber v. Sullivan, 58 Iowa, 265, 12 N. E. 319.

[15] American Bible Soc. v. Price, 115 Ill. 633, 5 N. E. 126. See Trish v. Newell, 62 Ill. 202.

[16] Dyer v. Dyer, 87 Ind. 18; Web-

§ 695. **"Sound mind and memory" defined.**—(1) The law requires that a person, in order to make a valid will, should be of sound and disposing mind and memory. What we mean by soundness, in this respect, is not that the mind should be in its full vigor and power, but that its faculties, its machinery, should be in working order, so to speak, with an active power to collect and retain the elements of the business to be performed, for a sufficient time to perceive their obvious relation to each other.[17]

(2) A party competent to make a valid will should possess a mind capable of exercising judgment, reason and deliberation—a mind capable of weighing the consequences of his will and its effects to a certain degree upon his estate and family; and all persons devoid of such reason are incompetent to make a valid will.[18] (3) The expression "sound mind and memory," as used in the statute, means nothing more than the words "sound and disposing mind."[19]

(4) The term "sound mind" in the statute does not mean that the testator shall have the same command of his mental faculties that he may have when in health. The law, recognizing that wills are often made in extremis, when the bodily powers are broken and the mental faculties are enfeebled, only requires that the testator shall retain so much of his mental power as will enable him to understand his relations to those who would be the natural objects of his bounty, and the property he wishes to distribute, and the manner in which he intends to distribute it.[20]

(5) A person of sound mind or memory, within the meaning of the law, is one who has full knowledge of the act she is engaged in and of the property she possesses, an intelligent understanding of the disposition she desires to make of it, and of the persons she desires shall receive her property, and the capacity to recollect and apprehend the nature of the claims of those who are excluded from participating in her bounty. It is not necessary that she should have sufficient capacity to make contracts to do business generally, or to engage in complex and intricate business matters;

ber v. Sullivan, 58 Iowa, 265, 12 N. W. 319; American Bible Soc. v. Price, 115 Ill. 633, 5 N. E. 126; McGinnis v. Kempsey, 27 Mich. 366.

[17] McGinnis v. Kempsey, 27 Mich. 367.

[18] Bates v. Bates, 27 Iowa, 115.

[19] Yoe v. McCord, 74 Ill. 40.

[20] McGinnis v. Kempsey, 27 Mich. 365.

and if the jury believe from the evidence in the case that, at the time of making the will in controversy, the deceased, G, had such a knowledge as above defined, and possessed such understanding of the disposition she desired to make of her property and of the persons she desired to receive the same, and had capacity to recollect and apprehend the nature of the claims of those who were excluded from participating in her bounty, then she would be of sound mind and memory within the meaning of the law, even though the jury may believe from the evidence that she was physically weak, and did not have the mental capacity sufficient to make contracts to do business generally, or to engage in complex and intricate business matters. But if, on the other hand, you find by a preponderance of the evidence that, at the time of making the will in controversy, the deceased, G, had any such knowledge as above defined in this instruction, and did not possess such understanding as to the disposition she desired to make of her property and of the persons she desired to receive the same; and did not have capacity to recollect and apprehend the nature of the claims of those who were excluded from participating in her bounty, then she would not be of sound mind and memory within the meaning of the law.[21]

§ 696. **Maker of will presumed of sound mind.**—(1) The legal presumption is in favor of sanity, and, on the issue of sanity or insanity, the burden is upon him who asserts insanity to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue shall be found the other way, and in favor of the execution of the will.[22]

(2) When a will is proved, including soundness of mind and memory on the part of the testator, by the testimony of two subscribing witnesses, and unsoundness of mind is alleged as a ground for setting the will aside, the fact of insanity, or of unsoundness of mind, must be established with reasonable certainty; the evidence of insanity should preponderate or the will must be considered as valid. If there is only a bare balance of evidence, or a mere doubt only of the sanity of the testator,

[21] Hudson v. Hughan, 56 Kas. 159, 42 Pac. 701.

[22] Stephenson v. Stephenson, 62 Iowa, 166, 17 N. 456; Barnes v. Barnes, 66 Me. 300 (burden).

the presumption in favor of sanity, if proved as above stated, must turn the scale in favor of the sanity of the testator.[23]

(3) If the jury believe from the evidence that the said instrument of writing is consistent in its provisions and rational on its face, the presumption is that the said B was of sound mind at the time of the execution of the same, and the burden shifts to the contestants to show that he was not of sound mind at that time.[24]

(4) The legal presumption arises by law in favor of the sanity of all men, and, although this presumption is not conclusive, still the jury should consider it in hearing the evidence in the case of which for particular purposes it forms a part.[25]

(5) A will proved or admitted to have been executed and attested, as prescribed by law, will be presumed to have been made by a person of sound mind; but if testimony is shown which counterbalances that presumption, the party seeking to support such will must establish by affirmative evidence that the testator was of sound mind when he executed the will.[26]

(6) The law presumes, and it is your duty to presume, that every man who has arrived at the years of discretion is of sound mind and memory, and capable of transacting ordinary business, and capable of disposing of his property by will or otherwise, until the contrary is shown; and the court instructs you that, in the first instance, it is your duty to hold that C, at the time he executed the will offered in evidence, was of sound mind and memory, and to so hold until you believe, by a preponderance of the evidence, that he was otherwise.[27]

(7) When a will is proved, including soundness of mind and memory on the part of the testator, by the testimony of two subscribing witnesses, and unsoundness is alleged as a ground for setting the will aside, the fact of the insanity or unsoundness of mind must be established by a preponderance of the evidence; the evidence of insanity or unsoundness of

[23] Sackett Instructions, p. 592, citing: Jarman Wills, 5 Am. Ed. 104; Redfern Wills, 31-50; Perkins v. Perkins, 39 N. H. 163; Brooks v. Barrett, 7 Pick. (N. Y.) 94; Turner v. Cook, 36 Ind. 129; Dickie v. Carter, 42 Ill. 376; Terry v. Buffington, 11 Ga. 337; In re Coffman, 12 Iowa, 491; Cotton v. Ulmer, 45 Ala. 378.

[24] Bramel v. Bramel, 19 Ky. L. R. 72, 39 S. W. 521.

[25] McGinnis v. Kempsey, 27 Mich 366.

[26] Bates v. Bates, 27 Iowa, 114.

[27] Craig v. Southard, 162 Ill. 213, 44 N. E. 393.

mind should preponderate, or the will must be taken as valid. If there is only a bare balance of evidence, or a mere doubt only of the sanity of the testator, or of his unsoundness of mind, the presumption in favor of sanity, if proven as above stated, must turn the scale in favor of the sanity of the testator.[28]

§ 697. **Insane delusions, lucid intervals.**—(1) An insane delusion is a fixed and settled belief in facts not existing, which no rational person would believe. Such delusions may sometimes exist as to one or more subjects. And if the jury believe, from the evidence in this case, that Isaac Foreman was laboring under such insane delusions upon subjects connected with the testamentary disposition of his property and the natural objects of his bounty when he made the will in question, and was thereby rendered incompetent to comprehend, rationally, the nature and effect of the act, and that, but for such delusions, he would not have made the will as he did, then the jury should find against the validity of the will.[29]

(2) There is an essential difference between the apparently lucid intervals in delirium, and in general insanity. In delirium, the apparent return to reason may be real and unquestionable, while those which seem to occur in insanity are delusive, the patient being as really laboring under the powers of the malady as in the more distinctly marked periods of its progress; but testamentary incapacity does not necessarily presuppose the existence of insanity in its technical sense. Weakness of intellect, whether arising from extreme old age, from disease or great bodily infirmity, from intemperance, or from all these causes combined, and when such weakness disqualifies the testator from knowing or appreciating the nature and effect of consequences of the act he is engaged in, renders such testator incapable of making a valid will.[30]

§ 698. **Insanity is disease of brain affecting the mind.**—Insanity is a disease of the brain affecting the mind to such an extent

[28] Taylor v. Pegram, 151 Ill. 117, 37 N. E. 837; Hollenback v. Cook, 180 Ill. 65, 70, 54 N. E. 154; Wilber v. Wilber, 129 Ill. 392, 396, 21 N. E. 1076; Graybeal v. Gardner, 146 Ill. 337, 346, 34 N. E. 528.

[29] American Bible Soc. v. Price, 115 Ill. 623, 632, 5 N. E. 126. See Wait v. Westfall, 161 Ind. 648, 68 N. E. 238, as to the effect of evidence of delusions.

[30] McGinnis v. Kempsey, 27 Mich. 366.

as to destroy a man's capacity to attend to his ordinary business, or to know and understand the business he was engaged in when making a will. And unless the jury find from the evidence that Mr. Foreman's brain was diseased to such an extent that he did not have mind and memory sufficient to enable him to transact his ordinary business, such as renting his land, settling accounts, buying and selling property, and to know and understand the business he was engaged in at the time he made the will in dispute, the jury should find that said will is the will of said Foreman.[31]

§ **699. Mental weakness or eccentricities will not disqualify.** (1) Even if the jury are satisfied that the mental powers of P had become enfeebled or disturbed by disease at the time he made the alleged will, still, if they find from the evidence that he did fully understand and intend to make the disposition which he made of his property, then the will must stand, as touching the question of mental soundness or capacity.[32]

(2) If in the present case you should find from the evidence that P, on the day he made the alleged will, was delirious or that his mental faculties were otherwise obscured by the disease from which he was suffering, still this would not necessarily prevent his having sufficient capacity to make a will. Delirium or obscuration of the mental faculties by disease must be so complete and so becloud the mind, that the testator does not understand the nature of the business in which he is engaged, or does not understand at the time of making the instrument, substantially the act, the extent of his property, his relations to others, who might or ought to be the objects of his bounty, and the scope and bearing of the provisions of the will, and does not possess the other qualifications which I have already referred to.[33]

(3) The impairing of the mental faculties by the effects of acute disease such as delirium, or the enfeebling of them from any of the causes incident to such disease, must be to that extent which deprives him of the use of his reason and understanding to the extent already intimated, for if this is not the testator's situa-

[31] American Bible Soc. v. Price, 115 Ill. 623, 634, 5 N. E. 126.

[32] McGinnis v. Kempsey, 27 Mich. 365.

[33] McGinnis v. Kempsey 27 Mich. 365.

tion, although his understanding may be to some extent obscured and his memory troubled, yet he may make his will.[34]

(4) Eccentricities or peculiarities, or radical or extreme notions or opinions upon religion, colleges, education or masonry and secret societies, will not necessarily render a man incapable of making a will; and if the jury find that in making the will in dispute, Isaac Foreman had sufficient mind and memory to understand the businese he was engaged in when he made the will, then the jury should find in favor of said will, though said Foreman may have had eccentricities and peculiarities, or extreme notions and opinions upon religion, colleges, education or masonry or secret societies.[35]

§ 700. **Unsoundness of mind of permanent nature.**—The law presumes that every person is of sound mind until the contrary is proven. Yet when unsoundness of mind of a permanent nature has been established, the presumption is that such state of unsoundness exists or continues until the contrary is shown.[36]

§ 701. **Considerations in determining mental state.**—(1) In determining the issues of facts submitted to you under these instructions you should carefully look to all the evidence before you, and in doing so you should take into consideration the physical condition of G, arising from her age, sickness or any other cause; the condition of her mind at and before the time of the execution of the will in controversy; the execution of the will and its contents; the execution of any former will by her and the provisions thereof; the relations existing between her and the parties respectively herein at and before the execution of the will in controversy; her family and connections; the terms on which she stood with them; the claims of particular individuals; the condition and relative situation of the legatees and devisees named in the will; the situation of the testatrix herself and the circumstances under which the will was made; and, in brief, every fact or circumstance which tends to throw any light on the question submitted to you.[37]

(2) It is proper for the jury to consider any statement which

[34] McGinnis v. Kempsey, 27 Mich. 366.

[35] American Bible Soc. v. Price, 115 Ill. 623, 633, 5 N. E. 126.

[36] Wallis v. Luhring, 134 Ind. 450, 34 N. E. 231.

[37] Hudson v. Hughan, 56 Kas. 160, 42 Pac. 701.

may have been made by the testator before the making of his will, in reference to what he intended to do with his property. If you should find from the evidence that when he was in good health he stated his intention of disposing of his property substantially as it is disposed of in the will, this is an important fact to be considered by you in determining the validity of the will and as tending to its support.[38]

(3) If upon the whole evidence you believe James Entwistle was not of sound mind and memory, as defined in these instructions, then you should find that the purported will is not the will of James Entwistle, deceased.[39]

§ 702. Testimony of medical experts in determining mental condition.—The testimony of medical men of experience in their profession in this class of cases, after careful examination of the testator's mental condition, touching the mental condition of the deceased at the time of the execution of the will in question, may be by you given more weight and consideration than the testimony of non-professional witnesses.[40]

§ 703. Considerations in determining validity of will.—There is some evidence in this case tending to show that the testator was at one time engaged in some litigation with the mother of the contestant, and bore some ill will or dislike toward her; and you are instructed that if the testator was influenced thereby to make his will as he did, and at the time was of sound mind, if he did so by his own free choice and agency, his will would be valid and should be recognized by you; even if he did it unjustly or with mistaken opinion as to the matters involved, yet that would not invalidate the will, but would rather tend to explain why he made his will as he did.[41]

§ 704. "Undue influence" used in procuring a will.—(1) That

[38] Conway v. Vizzard, 122 Ind. 268, 23 N. E. 771. But such declarations cannot be considered in connection with the issue of undue influence.

[39] Entwistle v. Meikle, 180 Ill. 9, 28, 54 N. E. 217; Slingloff v. Bruner, 174 Ill. 561, 569, 51 N. E. 772.

[40] Blake v. Rourke, 74 Iowa, 523, 38 N. W. 392. But see Blough v. Parry, 144 Ind. 463, 472, 4 N. E. 70; Jones v. Casler, 139 Ind. 382, 38 N. E. 812.

[41] In re Townsend's Est. (Iowa), 97 N. W. 1111.

inequality in the distribution of property among those who would inherit if no will had been made is not of itself evidence of undue influence or unsoundness of mind, yet it may be considered as a circumstance by the jury, together with all the other facts and circumstances shown by the evidence as tending to establish undue influence or unsoundness of mind.[42]

(2) If you find that the will was valid at the time of its execution it remained valid and is valid now, unless it has been revoked, which is not claimed by the contestants. The condition of the mind of the testator, or any undue influence exercised over him after the execution of the will could not invalidate it, and no such claim is made in this case. However, the law permits the facts and circumstances occurring after the execution of the will to be shown relating to the condition of the testator's mind, and the question of fraud and undue influence claimed to have been exercised over him, for the purpose of proving by inference or otherwise that the conditions existed before and at the time of the execution of the will as existed afterwards on these points.[43]

(3) When undue influence is alleged the real inquiry is this: Did the testator make and execute the alleged will in all its provisions of his own free will and volition so that it now expresses his own wishes and intentions, or was the testator constrained or induced through the undue influence, restraint, coercion or improper conduct of others, to act contrary to his own desire and intentions regarding the disposition of his property or any part of it.[44]

(4) If you believe from the evidence that the said E at the time he executed the will now in question, was feeble in body and mind from sickness, old age or otherwise, and that while in this condition his son unduly influenced him to make said purported will, and that at said time E was not a free agent, but was under the undue influence of his son, then you should so find in your verdict.[45]

(5) In order that the contestant may recover in this case, there are two facts that must be proven by her; first, that undue influ-

[42] England v. Fawbush, 204 Ill. 384, 68 N. E. 526.

[43] Haines v. Hayden, 95 Mich. 350, 54 N. W. 911.

[44] England v. Fawbush, 204 Ill. 396, 68 N. E. 526.

[45] England v. Fawbush, 204 Ill. 394, 68 N. E. 526.

ence was in fact exerted; second, that it was successful in subverting and controlling the will of the testator. Both of these facts must be proven by the contestant by the weight of the evidence in order to defeat the will. Upon the latter question, evidence of the statements of the testator, made either before the will was made or after, and which tend to throw light on the condition of mind are admissible; but as to the first question, the evidence of such statements is hearsay and incompetent and should not be considered by you. Such declarations have been admitted only for the purpose of proving the condition of the testator. They afford no substantive proof of undue influence, and cannot be admitted for such purpose; and before the contestant can recover it is necessary that she should prove that undue influence was, in fact, actually exerted upon the testator, by other evidence than his own declarations.[46]

(6) Whether the free agency of the testator is destroyed or controlled by physical force or mental coercion, by threats which occasion fear or by importunity which the testator is too weak to resist or which extorts compliance in the hope of peace, is immaterial. In considering the question, therefore, it is essential to ascertain as far as practicable the power of coercion on the one hand, and the liability of its influence on the other. And whereever, through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another, the latter obtains ascendency which prevents the former from exercising an unbiased judgment, undue influence exists.[47]

(7) It is not necessary that there should be confidential relations between all the beneficiaries and the testator. If there is such a relation with one of the family, and the will is found to have been procured through his undue influence, it operates against all the family.[48]

(8) As bearing on the question of undue influence, if you find from the evidence that some months before the execution of the will, when in good health and of unquestioned soundness of mind, the testator declared in the presence of H that he intended to do a

[46] In re Townsend's Est. (Io. a), 97 N. W. 1111.

[47] Coghill v. Kennedy, 119 Ala. 641, 24 So. 464.

[48] Coghill v. Kennedy, 119 Ala. 641, 24 So. 464.

good part by H, or pay him well for attentions and kindness bestowed, or give him a home; and if you further find from the evidence, that the bequest of H is in substantial compliance with such declaration, you should consider this fact in determining whether or not H used undue influence in procuring the bequest made to him.[49]

§ 705. Advising person to make will is not improper.—(1) It is not unlawful for a person by honest advice or persuasion to induce a testator to make a will or to influence him in disposing of his property by will. Such advice or persuasion will not vitiate a will made freely from a conviction of its propriety. To avoid a will the influence which is exercised must be undue, and this means something wrongful, amounting to a species of fraud.[50]

(2) Though the devisee may have had improper intercourse with the testatrix, that of itself, however immoral such relation may be, is not sufficient to invalidate a will made in favor of the wrongdoer, if no improper influences are shown to have been exerted to induce the making of the will.[51]

§ 706. Will presumed genuine, not forgery.—(1) In civil as well as in criminal actions the law indulges the presumption of innocence and fair dealing in all transactions; and in this particular case the law presumes that the signatures to the will in contest are genuine and not forged, and that the defendant is innocent of all criminal conduct in relation thereto. In criminal charges the presumption of innocence must be overthrown and guilt proven beyond a reasonable doubt in order to secure a conviction; but in civil cases like the present, involving a charge of criminality, the rule of proof is different and not so strong. For the plaintiffs to recover upon the charge of forgery they are not compelled to prove the charge beyond a reasonable doubt, but the law is satisfied, and you must be, if the charge is proven by a fair preponderance of the evidence; that is, the evidence in favor of the forgery must overcome the presumption of innocence, and all countervailing evidence of genuineness.[52]

[49] Goodbar v. Lidikey, 136 Ind. 7, 35 N. E. 691. Held proper where there is evidence tending to rebut the charge of undue influence.

[50] Yoe v. McCord, 74 Ill. 44; Dickie v. Carter, 42 Ill. 388.

[51] Dickie v. Carter, 42 Ill. 388; Eckert v. Flowry, 43 Pa. St. 46.

[52] McDonald v. McDonald, 142 Ind. 89, 41 N. E. 336.

(2) If the evidence shows that the decedent, B, executed the written instrument offered for probate by the proponents herein; that he requested Parish and Petty to attest the execution, which they did in the presence of the testator, then such instrument is not a forgery. If you find that the decedent, B, signed said instrument, it cannot be a forgery.[53]

[53] Miller v. Coulter, 156 Ind. 298, 59 N. E. 853.

CHAPTER XLVI.

CAUTIONARY INSTRUCTIONS IN CRIMINAL CASES.

Sec.
707. Caution as to duty in grave cases.
708. Deliberations of jurymen as to verdict.

JUDGES OF CRIMINAL LAW.

709. In Illinois the jury are the judges.
710. In Indiana the jury are the judges.
711. In Ohio the court is the judge.
712. In Iowa the court is the judge.

§ **707. Caution as to duty in grave cases.**—(1) The duty of counsel and the court has now been performed. The counsel engaged in the case have been untiring in their efforts to bring before you all possible evidence that may aid you in arriving at the truth. They have ably assisted you in applying the evidence to the facts in contention. The court has endeavored to rightly advise you on the law, and now there confronts you the final and important duty of pronouncing upon the guilt or innocence of the defendant. I submit this case to you with the confidence that you will faithfully discharge the grave duty resting upon you without upon the one hand being moved by any undue demand for conviction on the part of counsel for the state, or being swayed from its right performance by any undue appeal to your sympathies. You will bear in mind that neither the life nor the liberty of the accused may be trifled away, and neither taken by careless or inconsiderate judgment. But if, after a careful consideration of the law and the evidence in the case, you are satisfied beyond a reasonable doubt that the defendant is guilty, you should return your verdict accordingly. Duty demands it, and the law requires it. You

must be just to the defendant and equally just to the state. As manly, upright men, charged with the responsible duty of assisting the court in the administration of justice, you will put aside all sympathy and sentiment, all consideration of public approval or disapproval, and look steadfastly and alone to the law and evidence in the case, and return into court such a verdict as is warranted thereby.[1]

(2) It is proper for the court to remind you that the issue in this case is to the defendant of so grave a nature, and to the public safety of such vital importance, that upon your part there should be no error. The accused, if he be innocent, ought not to be erroneously convicted, and on the contrary, if he be guilty, he ought not to be erroneously acquitted. You were, after careful effort, selected as intelligent and qualified jurors, sworn to impartially try and determine this cause, and a true verdict render according to the law and the evidence. If you comply with your oaths, error against either side must be precluded. Remember that the defendant's life and liberty are his most sacred and highest rights, and can only be forfeited by him for the causes, upon the conditions, and in the manner prescribed by law. In considering his rights do not forget that by each acquittal of a guilty criminal the safeguard erected by society for its protection is weakened; for, by the non-enforcement of penalties affixed to criminal acts, contempt for the law is bred among the very class that it is intended to restrain. The evidence has been placed before you; an exhaustive discussion of the facts by counsel on either side has been had in your hearing, and such instructions as in the judgment of the court would aid you in arriving at a correct decision have been given.[2]

§ 708. **Deliberations of jurymen in reaching a verdict.**—(1) Each juror acts for himself in coming to a conclusion, and acts on his own convictions; and although it is true that in case any one of the jurors entertains a reasonable doubt as to the guilt of the defendant he ought not to find him guilty, yet such doubt in the mind of one or more of the jurors ought not to control the action

[1] Hinshaw v. S. 147 Ind. 384, murder case, 47 N. E. 157.

[2] Stout v. S. 90 Ind. 13.

of the other jurors, so as to compel them to give a verdict of acquittal.[3]

(2) The jury are admonished that there should be no mistrial in this case, if it be possible for the jury to agree upon a verdict, if they can do so without violating their conscientious convictions, based on the evidence. This case has taken up a whole week of this term, and has necessarily been costly to the state and county, and has forced the postponement of other important cases. The jury should therefore lay aside pride of opinion and judgment, examine any differences of opinion there may be among them in a spirit of fairness and candor, reason together, and talk over such differences and harmonize them, if this be possible, so that this case may be disposed of.[4]

(3) It is the duty of each juryman, while the jury are deliberating upon their verdict, to give careful consideration to the views his fellow-jurymen may have to present upon the testimony in the case. He should not shut his ears and stubbornly stand upon the position he first takes, regardless of what may be said by the other jurymen. It should be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness. It is your duty to agree upon a verdict if possible.[5]

Judges of Criminal Law.

§ **709. In Illinois the jury are the judges.**—(1) You are the judges of the law as well as the facts. But you are instructed that it is your duty to accept and act upon the law as given you by the court, unless you can say upon your oaths that you are better judges of the law than the court; and if you can say upon your oaths that you are better judges of the law than the court, then you are at liberty to so act.[6]

(2) You are the judges of the law as well as the facts of this case, and if you can say upon your oaths that you know the law better than the court does, then you have the right to do so; but,

[3] Fassinow v. S. 89 Ind. 237.

[4] Sigsbee v. S. 43 Fla. 524, 30 So. 816; Myers v. S. 43 Fla. 500, 31 So. 275.

[5] Jackson v. S. 91 Wis. 253, 64 N. W. 838.

[6] Davison v. P. 90 Ill. 231. Note: The statute of Illinois provides that "in all criminal cases the jury shall be the judges, the law and fact."

before assuming so solemn a responsibility, you should be assured that you are not acting from caprice or prejudice; that you are not controlled by your will or wishes, but from a deep and confident conviction that the court is wrong and that you are right. Before saying this upon your oaths it is your duty to reflect whether, from your study and experience, you are better qualified to judge the law than the court. If under all the circumstances you are prepared to say that the court is wrong in its exposition of the law, the statute has given you that right.[7]

§ 710. **In Indiana the jury are the judges.**—(1) You are the judges of the law as well as the facts in this case. You can take the law as given and explained to you by the court, but, if you see fit, you have the legal and constitutional right to reject the same and determine and construe it for yourselves. But notwithstanding you have the legal right to disagree from the court as to what the law is, still you should consider and weigh the instructions given you as you weigh the evidence, and you should disregard neither without proper reason.[8]

(2) You are the judges of the law and the evidence, and of what facts are proved and what facts are not proved. It is the duty of the court to instruct you in the law, but the instructions of the court are advisory only, and you may disregard them and determine the law for yourselves. Likewise the decisions of the Supreme Court read to you by counsel are not binding upon you, and you may disregard such decisions and determine for yourselves what the law is.[9]

§ 711. **In Ohio the court is the judge of the law.**—It is the duty of the jury to receive the law as it is given them by the court; it is the exclusive province of the court to determine what the law is; and the jury have no right to hold the law to be otherwise in any particular than as given to them by the court.[10]

[7] Spies v. P. 122 Ill. 83, 12 N. E. 865; Mullinix v. P. 76 Ill. 215. See Schnieder v. P. 23 Ill. 25; S. v. Hannibal, 37 La. Ann. 620.

[8] Blaker v. S. 130 Ind. 203, 29 N. E. 1077; Anderson v. S. 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; Hudelson v. S. 94 Ind. 431. See Bissot v. S. 53 Ind. 408.

[9] Fowler v. S. 85 Ind. 541, citing Keiser v. S. 83 Ind. 234. But see Bridgewater v. S. 153 Ind. 560, 566, 55 N. E. 737.

[10] Robbins v. S. 8 Ohio St. 131, 167.

§ 712. In Iowa the court is the judge.—Gentlemen of the jury: You have taken a solemn oath to try this cause according to the law and evidence given you in open court, and you have no authority to consider or be controlled by anything else than that given you by the court as the law; and unless your verdict accords with the law as given you by the court, you are guilty of willful perjury. It makes no difference what you think the law ought to be, you have no authority to consider or be controlled by anything else as law than that given you by the court.[11]

[11] S. v. Miller, 53 Iowa, 157, 4 N. W. 838, 900.

CHAPTER XLVII.

PRESUMPTION OF INNOCENCE.

Sec.
713. Defendant is presumed innocent.
714. Presumption of innocence a protection.
715. Presumption continues through trial.

§ **713. Defendant is presumed innocent.**—(1) The rules with reference to the presumption of innocence and the burden of proof are among the fundamental principles of our law, and must be regarded throughout your consideration of the evidence.[1]

(2) All presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent of the offense charged until he is proven guilty. If, upon such proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of an acquittal.[2]

(3) The defendants are presumed to be innocent of the offense charged; that, before you can convict them, or either of them, the state must overcome that presumption by proving such defendant or defendants to be guilty beyond a reasonable doubt. If the jury have a reasonable doubt as to the guilt of either of the defendants, they should acquit such defendant; but a doubt, to authorize an acquittal, must be a substantial doubt, and not a mere possibility of innocence.[3]

§ **714. Presumption of innocence a protection.**—The rule of

[1] S. v. Linhoff, 121 Iowa, 632, 636, 97 N. W. 78.
[2] S. v. Fahey (Del.), 54 Atl. 693.
[3] S. v. Peebles (Mo.), 77 S. W. 519.

law which clothes every person accused of crime with the presumption of innocence and imposes on the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one who is in fact guilty to escape, but is a humane provision of the law, intended so far as human agencies can to guard against the danger of any innocent person being unjustly punished.[4]

§ 715. **Presumption continues through trial.**—(1) The law presumes the defendant to be innocent of the crime charged, and this presumption continues in his favor throughout the trial, step by step; and you cannot find the accused guilty of any of the crimes charged in the indictment until the evidence in the case satisfies you beyond a reasonable doubt of his guilt. And as long as any of you have a reasonable doubt as to the existence of any one of the several elements necessary to constitute the offense or offenses charged, the accused cannot be convicted.[5]

(2) This defendant, like all other persons accused of crime, is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt, and this presumption of innocence goes with him all through the case until the jury shall have reached a verdict.[6]

(3) The law raises no presumption against the defendant. On the contrary, the presumption of law is in favor of his innocence. This presumption of innocence continues through the trial until every material allegation in the information is established by evidence to the exclusion of all reasonable doubt.[7]

[4] Hawk v. S. 148 Ind. 254, 46 N. E. 127; Turner v. S. 102 Ind. 427, 1 N. E. 869; S. v. Medley, 54 Kas. 627, 39 Pac. 227.

[5] Aszman v. S. 123 Ind. 360, 24 N. E. 123; Line v. S. 51 Ind. 175. See Morrisson v. S. 76 Ind. 339; Densmore v. S. 67 Ind. 306; Stockslager v. U. S. 116 Fed. 599.

[6] P. v. McNamara, 94 Cal. 514, 29 Pac. 953; P. v. O'Brien, 106 Cal. 105. 39 Pac. 325.

[7] Edwards v. S. (Neb.), 95 N. W. 1038; Van Syoc v. S. (Neb.), 96 N. W. 266.

CHAPTER XLVIII.

REASONABLE DOUBT.

Sec.

FOR THE PROSECUTION.

716. A substantial, well-founded doubt.
717. A doubt for which a reason can be given.
718. Doubt from undue influence.
719. Hunting up doubts outside of evidence.
720. Reasonable certainty only required.
721. Doubt as to "each link" in chain.
722. Jurors are to believe as men.

FOR THE DEFENSE.

723. Every reasonable theory must be excluded.
724. Doubt, though a probability of guilt.
725. Doubt confined to essential facts.
726. Doubt arising from part of the evidence.

PROBABILITIES.

727. A mere probability not sufficient.

ONE OF TWO OR MORE.

728. Uncertain which of two is guilty.

For the Prosecution.

§ **716. Substantial, well-founded doubt.**—(1) A reasonable doubt is such a doubt as arises from a candid and impartial consideration of all the evidence in the case, and which would cause a reasonable and prudent man to pause and hesitate in the graver transactions of life; and a juror is satisfied beyond a reasonable doubt if, from a candid consideration of the entire evidence, he has an abiding conviction of the truth of the charge.[1]

(2) A reasonable doubt means, in law, a serious, substantial and well-founded doubt, and not the mere possibility of a doubt; and the jury have no right to go outside of the evidence to search

[1] Maxfield v. S. 54 Neb. 44, 74 N. W. 401.

for or hunt up doubts in order to acquit the defendant, not arising from the evidence or a want of evidence.[2]

(3) Before the jury can convict the defendant they must be satisfied of his guilt beyond a reasonable doubt; such doubt, to authorize an acquittal upon a reasonable doubt alone, must be a substantial doubt of the defendant's guilt with a view of all the evidence in the case, and not a mere possibility of his innocence.[3]

(4) A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty.[4]

(5) Evidence is sufficient to remove a reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent men of the truth of the proposition with such force that they would act upon that conviction without hesitation in their own most important affairs.[5]

§ 717. Doubt for which a reason can be given.—A reasonable doubt is a doubt for which you can give a reason. In other words, if the evidence of the defendant's guilt satisfies you to such an extent as to leave you without a doubt that he may be innocent, for which you can give an intelligent reason, then it would be your duty to convict. Such a doubt may arise either from affirmative evidence tending to show the defendant's innocence, or from the lack of evidence sufficient to establish his guilt.[6]

§ 718. Doubt from undue sensibility.—(1) The doubt under the influence of which the jury should find a verdict of not guilty must be a reasonabe one. A doubt produced merely by undue sensibility in the mind of any juror in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not al-

[2] Earll v. P. 73 Ill. 334; Smith v. P. 74 Ill. 146. But see Rhodes v. S. 128 Ind. 189.

[3] S. v. Darrah, 152 Mo. 522, 54 S. W. 226; S. v. Vansant, 80 Mo. 72.

[4] Willis v. S. 43 Neb. 102, 61 N. W. 254. Held erroneous in Brown v. S. 105 Ind. 385, 5 N. E. 900, on the ground that a reasonable doubt may arise from lack of evidence as well as upon a consideration of the evidence.

[5] Jarrell v. S. 58 Ind. 296; Toops v. S. 92 Ind. 16; Stout v. S. 90 Ind. 12.

[6] Wallace v. S. 41 Fla. 547, 26 So. 713. Contra, Siberry v. S. 133 Ind. 677, 33 N. E. 681.

lowed to create sources or materials of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible states of facts differing from that established by the evidence.[7]

(2) A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt. You are not at liberty to disbelieve, as jurors, if, from the evidence, you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered. If, after an impartial consideration of all the evidence, you feel an abiding conviction of the guilt of the defendant, and are satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt.[8]

§ **719. Hunting up doubts outside of evidence.**—(1) In considering this case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.[9]

(2) In considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable

[7] Watt v. P. 126 Ill. 30, 18 N. E. 340; Spies v. P. 122 Ill. 81, 12 N. E. 865, 17 N. E. 898. See Dunn v. P. 109 Ill. 644.

[8] Willis v. S. 43 Neb. 102, 61 N. W. 254. Such an instruction was held erroneous in Siberry v. S. 133 Ind. 677, 686, 33 N. E. 681, as relieving the jurors from the obligation of their oath.

[9] Painter v. P. 147 Ill. 444, 467, 35 N. E. 64; S. v. Pierce, 65 Iowa, 90, 21 N. W. 195. But see Brown v. S. 105 Ind. 385, 5 N. E. 900, note 4, this chapter.

and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If, after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.[10]

§ 720. **Reasonable certainty only required.**—A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. You will be justified, and are required, to consider a reasonable doubt as existing if the material facts, without which guilt cannot be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenuous artificial doubt is of no avail. You will look, then, to all the evidence, and if that satisfies you of the defendant's guilt you must convict him. If you are not fully satisfied, but find that there are only strong probabilities of guilt, your only safe course is to acquit.[11]

§ 721. **Doubt as to "each link" in the chain.**—The rule requiring you to be satisfied of the defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that you should be satisfied, beyond a reasonable doubt, of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient, if, taking the testimony all together, you are satisfied beyond a reasonable doubt that the defendant is guilty.[12]

§ 722. **Jurors are to believe as men.**—You are not at liberty to disbelieve as jurors if, from all the evidence, you believe as

[10] Miller v. P. 39 Ill. 457, 463. But see Brown v. S. 105 Ind. 385, 5 N E. 900, note 4, this chapter.

[11] Clark v. S. 12 Ohio 495; See Morgan v. S. 48 Ohio St. 377, 27 N. E. 710.

[12] Bressler v. P. 117 Ill. 422, 437, (held not erroneous where there is direct evidence); Gott v. P. 187 Ill. 249, 260, 58 N. E. 293. See Carleton v. P. 150 Ill. 181, 189, 37 N. E. 244; S. v. Myers, 12 Wash. 77, 40 Pac. 626; Hauk v. State, 148 Ind. 238, 254, 46 N. E. 127, 47 N. E. 465. In Sutherlin v. S. 148 Ind. 695, 48 N. E. 246, the court declared that under the Indiana law there is no difference in the application of the doctrine of reasonable doubt whether the evidence is direct or circumstantial.

men. Your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered.[13]

For the Defense.

§ **723. Every reasonable theory must be excluded.**—(1) A reasonable doubt is one that excludes every reasonable hypothesis except that of the guilt of the defendant, and only when no other supposition will reasonably account for all the conditions of the case can the conclusion of guilt be legitimately adopted.[14]

(2) If the jury are not satisfied beyond all reasonable doubt to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of defendant's guilt, they should find him not guilty, and it is not necessary to raise a reasonable doubt that the jury should find a probability of defendant's innocence; but such a doubt may arise even where there is no probability of his innocence in the testimony; and if the jury have not an abiding conviction to a moral certainty of his guilt they should acquit him.[15]

(3) You should acquit the defendant unless the evidence excludes every reasonable hypothesis but that of his guilt.[16]

§ **724. Doubt, though a probability of guilt.**—(1) A reasonable doubt may exist though there is no probability of the innocence of the defendant from the evidence; and if the jury have not an abiding conviction to a moral certainty of his guilt then they should find him not guilty.[17]

(2) The court charges the jury that a reasonable doubt of the defendant's guilt is not the same as a probability of his innocence. A reasonable doubt of the defendant's guilt may exist when the evidence fails to convince the jury that there is a probability of the defendant's innocence.[18]

§ **725. Doubt confined to essential facts.**—(1) The doctrine of

[13] Bartley v. S. 53 Neb. 310, 73 N. W. 744; Watt v. P. 126 Ill. 30, 18 N. E. 340; Spies v. P. 122 Ill. 81, 12 N. E. 865; Willis v. S. 43 Neb. 102, 61 N. W. 254. But see Siberry v. S. 133 Ind. 677, 686, 33 N. E. 681; note 8 this chapter.

[14] Yarbrough v. S. 105 Ala. 43, 16 So. 758.

[15] Rogers v. S. 117 Ala. 192, 23 So. 82. See S. v. Clancy, 20 Mont. 498, 52 Pac. 267.

[16] Sherrill v. S. (Ala.), 35 So. 130.

[17] Davis v. S. 131 Ala. 10, 31 So. 569.

[18] Stewart v. S. 133 Ala. 105, 31 So. 944.

reasonable doubt, as a rule, has no proper application to mere matters of subsidiary evidence, taken item by item, but is applicable always to the constituent essential elements of the crime charged, and to any fact or group of facts which may constitute the entire proof concerning any of the constituent or elementary facts necessary to constitute guilt. If, from the whole evidence, or the want of evidence, any material fact essential to a conviction has not been established to your satisfaction beyond a reasonable doubt, as explained in these instructions, the defendant should be acquitted.[19]

(2) One of the material questions in this case is, whether or not the wire in question is the identical wire taken from the electric-light house, and the burden is on the prosecution to prove beyond a reasonable doubt the identity of the wire as coming from the electric-light house.[20]

(3) The court instruct you that, unless you believe from the evidence beyond every reasonable doubt that the witness, C, saw and recognized the defendant on the night of the killing, as stated by him, you will acquit the defendant.[21]

§ 726. **Doubt arising from part of evidence.**—If the jury, upon considering all the evidence, have a reasonable doubt about the defendant's guilt arising out of any part of the evidence, they must find him not guilty.[22]

§ 727. **A mere probability is not sufficient.**—(1) It is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the charge to a reasonable and moral certainty—a certainty which convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act upon it conscientiously.[23]

(2) Mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the greater weight or preponderance

[19] Hauk v. S. 148 Ind. 254, 46 N. E. 127; Hinshaw v. S. 147 Ind. 379, 47 N. E. 157.

[20] Bishop v. P. 194 Ill. 365, 369, 62 N. E. 785.

[21] Petty v. S. (Miss.), 35 So. 213. The testimony of C. was the only evidence tending to connect the defendant with the crime charged.

[22] Hunt v. S. 135 Ala. 1, 33 So. 329.

[23] S. v. Fahey (Del.), 54 Atl. 693.

of the evidence supports the allegations of the indictment; nor is it sufficient that, upon the doctrine of chances, it is more probable that the defendant is guilty than innocent To warrant a conviction the defendant must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together, and if the prosecution has failed to make such proof, the jury should find the defendant not guilty.[24]

(3) In all criminal cases it is essential to a verdict of condemnation that the guilt of the accused shall be fully proved; neither a mere preponderance of evidence nor any weight of preponderant evidence is sufficient for the purpose unless it generates full belief of the facts to the exclusion of all reasonable doubt.[25]

(4) If the evidence in the case leaves it indifferent which of several hypotheses arising and growing out of the evidence in the case is true, or merely establishes some finite probability in favor of the hypothesis of guilt, rather than another, such evidence cannot amount to legal proof of guilt, however great the probability may be.[26]

§ **728. Uncertain which of two is guilty.**—(1) If it is uncertain from the evidence, in the minds of the jury, which one or two or more persons inflicted the stab or blow, that would operate to acquit the defendant unless there is evidence that the defendant aided or abetted the one who actually did the killing.[27]

(2) When two persons had the same opportunity to commit the offense charged, and if, upon the whole evidence, there remains a reasonable doubt as to which of the two committed it, then neither of them can be convicted.[28]

(3) Before the jury can convict, it must be made to appear, from the evidence, beyond a reasonable doubt, that the defendant, and not somebody else, committed the offense charged in the indictment. It is not sufficient that the evidence may show that the defendant or some other person committed such offense, nor that the probabilities are that the defendant, and not some one else, committed such offense.[29]

[24] Dacey v. P. 116 Ill. 572, 6 N. E. 165.

[25] Fuller v. S. 12 Ohio St. 435, citing: 1 Starkie Ev. 451.

[26] Petty v. S. (Miss.), 35 S. E. 213.

[27] Campbell v. P. 16 Ill. 19:

[28] Vaughan v. Com. 85 Va. 672, 8 S. E. 584.

[29] Lyons v. P. 68 Ill. 272, 278.

CHAPTER XLIX.

CIRCUMSTANTIAL EVIDENCE.

Sec.		Sec.	
729.	Circumstantial evidence is competent.	733.	Each link in chain of circumstances.
730.	Every reasonable hypothesis, must be excluded.	734.	Degree of proof as to each essential fact.
731.	Circumstances consistent with each other.	735.	Subsidiary facts not within the rule.
732.	Inconsistent with any other rational theory.	736.	Circumstances of suspicion not evidence.

§ **729. Circumstantial evidence is competent.**—(1) Circumstantial evidence is legal and competent evidence in criminal cases; and if it is of such character as to exclude every reasonable hypothesis other than that of the guilt of the defendant, it is sufficient to authorize a conviction.[1]

(2) It is not necessary to prove the defendants guilty by testimony of witnesses who have seen the offense committed, but such guilt may be established by proof of facts and circumstances from which it may be reasonably and satisfactorily inferred.[2]

(3) In submitting a case depending entirely upon circumstantial evidence the jury should not be given loose rein, but should have careful direction as to the quantum of proof necessary to justify a conviction.[3]

(4) Circumstantial evidence is to be regarded by the jury in all cases. It is many times quite as conclusive in its convincing

[1] Cunningham v. S. 56 Neb. 691, 77 N. W. 60; Bennett v. S. 39 Tex. Cr. App. 639, 48 S. W. 61; Wantland v. S. 145 Ind. 38, 43 N. E. 931.

[2] S. v. Peebles (Mo.), 77 S. W. 520. See Lee v. S. 156 Ind. 541, 546, 60 N. E. 299.

[3] S. v. Brady, 100 Iowa, 191, 69 N. W. 290.

power as direct and positive evidence of eye witnesses. When it is strong and satisfactory the jury should so consider it, neither enlarging nor belittling its force. It should have its just and fair weight with the jury; and if, when it is all taken as a whole and fairly and candidly weighed, it convinces the guarded judgment, the jury should act upon such conviction. You are not to fancy situations or circumstances which do not appear in the evidence, but you are to make such just and reasonable inferences from circumstances proven which the guarded judgment of a reasonable man would ordinarily make under like circumstances.[4]

(5) Some testimony has been admitted tending to show that Samuel H. Marshall, who was jointly indicted with the defendant for the murder, shortly after the alleged murder was committed, had in his possession large sums of money, which it is claimed by the state was the property of the deceased. This fact, if it has been proved, is proper for you to consider, together with all the other facts and circumstances proved on the trial, in determining the guilt or innocence of the defendant; if you further find from the evidence that said money, or any part thereof, was obtained or procured by said Marshall from the deceased as the fruits of a conspiracy heretofore entered into by and between the defendant and the said Marshall, or by and between the defendant Marshall and some other person or persons, for the robbing and murder of the deceased or for the burglarizing the house of the deceased, and said facts, if any such facts have been proved, must be considered by you with all the other facts and circumstances proved in determining the guilt or innocence of the defendant; whether the defendant was or was not present at the time said Marshall was seen with said money, or any part thereof, in his possession.[5]

(6) If you believe from the evidence beyond a reasonable doubt that the defendant deliberately and intentionally shot M in manner and form as charged as he was passing along the public highway, and that from the effects of such shooting the said M died as alleged in the indictment, it matters not that such

[4] S. v. Elsham, 70 Iowa, 534, 31 N. W. 68.

[5] Musser v. S. 157 Ind. 431, 61 N. E. 1.

evidence is circumstantial or made up from facts and circumstances, provided the jury believe such facts and circumstances pointing toward his guilt have been proven by the evidence beyond a reasonable doubt.[6]

§ 730. Every other reasonable hypothesis must be excluded. (1) In the application of circumstantial evidence to the determination of this case the utmost caution and vigilance should be used. It is always insufficient when, assuming all to be proved which the evidence tends to prove, some other reasonable hypothesis arisng and growing out of the evidence in the cause than the one sought to be established by the evidence, may be true. It is the result based on the exclusion of every other reasonable hypothesis arising and growing out of the evidence in the case than that sought to be established by it, that will authorize the jury to act upon it, and give the circumstances the force of truth in the particular case.[7]

(2) When the facts proved are susceptible of explanation upon no reasonable hypothesis consistent with innocence, and point to guilt beyond any other reasonable solution, they are sufficient to rest a conviction upon, although the crime charged is of the utmost malignity and the penalty attached is the highest known to the law.[8]

(3) This is a case where the state seeks a conviction on circumstantial evidence. The defendant is presumed to be innocent until the contrary is made to appear by the evidence; and in a case of this kind, in order to convict, the circumstances must be so strong as to exclude every other reasonable hypothesis except that of the guilt of the defendant.[9]

(4) When a conviction is sought alone upon circumstantial evidence, the circumstances relied upon, taken together, must be incapable of explanation upon any other rational hypothesis but that of the defendant's guilt; and if, after a careful consideration of all the evidence in the case, there is in your minds any such reasonable doubt of the defendant's guilt, you will acquit.[10]

[6] Schoolcraft v. P. 117 Ill. 277, 7 N. E. 649. Contra: Otmer v. P. 76 Ill. 149.

[7] Petty v. S. (Miss.), 35 So. 213.

[8] Stout v. S. 90 Ind. 12.

[9] Wantland v. S. 145 Ind. 39, 43 N. E. 931. See also Mose v. S. 36 Ala. 221.

[10] Crutchfield v. S. 7 Tex. App. 65; Hunt v. S. 7 Tex. App. 212.

(5) You are further instructed that where the state seeks a conviction upon circumstantial evidence alone, it must not only show that the alleged facts and circumstances are true, but that they are absolutely incompatible with any reasonable hypothesis of the innocence of the accused.[11]

§ 731. The circumstances must be consistent with each other. (1) In order to warrant a conviction on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged; and it is an invariable rule of law that to warrant a conviction upon circumstantial evidence alone, such facts and circumstances must be shown as are consistent with the guilt of the person charged, and as cannot, upon any reasonable theory, be true and the person charged be innocent; and in this case, if all the facts and circumstances relied upon by the people to secure a conviction can be reasonably accounted for upon any theory consistent with the innocence of the defendant, then the jury should acquit the defendant.[12]

(2) The facts and circumstances shown in evidence and relied upon for a conviction must be consistent with each other and with the guilt of the accused, and taken together must be of a conclusive nature, producing a reasonable and moral certainty that the defendant and no other person committed the crime.[13]

§ 732. Inconsistent with any other rational theory.—(1) A few facts or a multitude of facts proven, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant committed the crime, but they must be inconsistent with any other rational conclusion.[14]

(2) In order to convict the defendant upon the evidence of cir-

[11] S. v. Brady, 100 Iowa, 191, 69 N. W. 290.

[12] Marzen v. P. 173 Ill. 61. See generally; S. v. Jones, 19 Nev. 365, 11 Pac. 317; S. v. Nelson, 11 Nev. 340.

[13] Crow v. S. 37 Tex. Cr. App. 295 39 S. W. 574.

[14] S. v. Andrews, 62 Kas. 207, 61 Pac. 808. See S. v. David, 131 Mo. 380, 33 S. W. 28; S. v. Hill, 65 Mo. 88.

cumstances it is necessary, not only that all the circumstances relied upon for a conviction concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for and therefore render probable the hypothesis sought to be established by the prosecution; but they must exclude to a moral certainty every other reasonable hypothesis but the single one of guilt, or the jury must find the defendant not guilty.[15]

§ 733. **"Each link" in chain of circumstance.**—(1) If you believe from the evidence before you beyond a reasonable doubt that Emma Moore came to her death by reason of a shot fired from a revolver by the hand of defendant substantially as charged in the indictment, it matters not that such evidence is circumstantial, or made up from the facts and circumstances surrounding the death and the relations of the defendant with her, provided only that the jury believe such facts and circumstances to be proven by the evidence beyond all reasonable doubt, and to be inconsistent with any other reasonable hypothesis than that of the guilt of the defendant. It is not enough, however, that all the facts and circumstances shown are consistent with the guilt of the defendant, but they must be of such character that they cannot be reasonably true in the ordinary nature of things and the defendant be innocent. The rule requiring the jury to be satisfied of the defendant's guilt beyond all reasonable doubt in order to warrant a conviction, does not require, however, that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish his guilt. It will be sufficient, if taking the evidence altogether, you are satisfied beyond all reasonable doubt that the defendant is guilty.[16]

(2) The law requires the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction, but does not require that you should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient, if taking

[15] P. v. Anthony, 56 Cal. 400.

[16] S. v. Lucas (Iowa), 97 N. W. 1007.

the testimony all together, you are satisfied beyond a reasonable doubt that the defendant is guilty, as charged in the indictment.[17]

§ **734. Degree of proof as to each essential fact.**—(1) The several circumstances upon which the conclusion depends must be fully established by proof. They are facts from which the main fact is to be inferred; and they are to be proved by competent evidence and by the same weight and force of evidence as if each one were itself the main fact in issue.[18]

(2) Where a conviction depends upon circumstantial evidence alone, each fact necessary to establish the guilt of the accused must be proved by competent evidence beyond a reasonable doubt, and the facts and circumstances proved should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis than that of his guilt.[19]

(3) When the evidence against the defendant is made up wholly of a chain of circumstances, and there is a reasonable doubt as to the existence of one of the facts essential to establish guilt, it is the duty of the jury to acquit the defendant.[20]

(4) The rule of law is that in order that a jury may be warranted in finding the defendant guilty on circumstantial evidence, all the facts and circumstances necessary to establish the conclusion of guilt must be proved beyond a reasonable doubt, all such facts and circumstances must be consistent with each other and with the conclusion sought to be established, which is, that the person on trial committed the crime charged. All such facts and circumstances must be inconsistent with any reasonable theory of the innocence of the defendant, and such facts and circumstances taken all together, must be of such conclusive and satisfactory nature as to produce in the minds of the jurors a reasonable and moral certainty that the person on trial, and not some other person, committed the offense charged.[21]

[17] Hodge v. Ter. 12 Okla. 108, 69 Pac. 1079. The evidence in this case was both direct and circumstantial. See also Hauk v. S. 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

[18] Com. v. Webster, 5 Cush. (Mass.) 317. See Johnson v. S. 18 Tex. App. 398.

[19] Baldez v. S. (Tex. Cr. App.), 35 S. W. 664; S. v. Crabtree, 170 Mo. 642, 71 S. W. 130; Johnson v. S. 18 Tex. Cr. App. 398.

[20] P. v. Anthony, 56 Cal. 397; See P. v. Aiken, 66 Mich. 460, 33 N. W. 821; S. v. Kruger, 7 Idaho, 178, 61 Pac. 463. Contra: Brady v. Com. 11 Bush (Ky.) 285.

[21] Galloway v. S. (Tex. Cr. App.), 70 S. W. 212.

§ 735. **Subsidiary facts not within the rule.**—(1) The doctrine of reasonable doubt as a general rule has no application to subsidiary evidence taken item by item. It is applicable to the constituent elements of the crime charged and to any fact or facts which constitute the entire proof of one or more of the constituent elements of the crime charged. That is to say all the facts which must have existed in order to make out the guilt of the accused must be established beyond a reasonable doubt before you can convict. But the rule of reasonable doubt does not apply to subsidiary and evidentiary facts, that is to say, to such facts and circumstances in evidence, if there be any such, as are not essential elements of the crime charged and not necessary to the proof thereof, and when considered together as a whole, tend to prove or disprove the existence of one or more of the primary facts necessary to make out the offense. Subsidiary and evidentiary facts may be considered by you in determining the necessary and essential facts when established by clear and satisfactory proof.[22]

(2) It is not necessary that the jury should believe that every material fact or circumstance in evidence before them shall be proven beyond a reasonable doubt, but that it is sufficient if the jury believe from the evidence in the case that every material allegation in the indictment or either count thereof, in manner and form as therein charged, has been proven beyond a reasonable doubt.[23]

§ 736. **Circumstances of suspicion not evidence.**—That circumstances of suspicion, no matter how grave or strong, are not evidence of guilt, and the accused must be acquitted unless the fact of his guilt is proven beyond every reasonable doubt to the exclusion of every reasonable hypothesis consistent with his innocence.[24]

[22] Hinshaw v. S. 147 Ind. 379, 47 N. E. 157; Wade v. S. 71 Ind. 535.

[23] Jamison v. P. 145 Ill. 357, 380, 34 N. E. 486.

[24] Henderson v. Com. 98 Va. 797 34 S. E. 881.

CHAPTER L.

CONFESSIONS, ADMISSIONS, FLIGHT.

Sec.		Sec.	
737.	Confessions to be considered like other evidence.	739.	Admissions of deceased.
738.	Admissions subject to imperfection.	740.	Flight tends to prove guilt.
		741.	Flight is a circumstance only.
		742.	Defendant surrendering.

§ 737. **Confessions to be considered like other evidence.**—(1) It is the duty of the jury to treat and consider any confessions proven to have been made by the defendant precisely as any other testimony; and hence if the jury believe the whole confession to be true, they will act upon the whole as the truth. But the jury may believe that which charges the prisoner and reject that which is in his favor if they see sufficient grounds in the evidence or in any inherent improbability in the statement itself. The jury are at liberty to judge of it like other evidence by all the circumstances in the case.[1]

(2) If verbal statements of defendant have been proven in this case, you may take them into consideration with all the other facts and circumstances proven. What the proof may show you, if anything, that the defendant has said against himself, the law presumes to be true because against himself, but anything you may believe from the evidence that defendant said in his own behalf, you are not obliged to believe, but you may treat the same as true or false, just as you believe it true or false, when

[1] Jackson v. P. 18 Ill. 271.

considered with a view to all the other facts and circumstances in the case.[2]

§ 738. **Admissions subject to much imperfection.**—(1) Verbal admissions consisting of mere repetitions of oral statements made a long time before are subject to much imperfection and mistake, for the reason that the person making them may not have expressed his own meaning, or the witness may have misunderstood him, or by not giving his exact language may have changed the meaning of what was actually said, and this is especially true where long time has elapsed since the alleged admissions were made; such evidence should therefore be received by you with caution.[3]

(2) Where a confession of the prisoner charged with a crime has been introduced in evidence, the whole of the confession so introduced and testified to must be taken together, as well that part which makes in favor of the accused as that part which makes against him; and if the part of the statement which is in favor of the accused is not disproved by other evidence in the case and is not improbable or untrue, considered in connection with all the other testimony in the case, then that part of the statement is entitled to as much consideration by the jury as any parts thereof which make against the accused.[3*]

(3) In a criminal case, admissions and confessions of the accused are admitted with caution, and the court tells you that it is your province to consider all the circumstances under which the alleged admissions were made, and determine their exact nature, import and meaning.[4]

§ 739. **Admissions of deceased.**—The admissions of the deceased shortly before his death will be considered by the jury with great care, and all the circumstances in connection therewith, his suffering, whether he was in such condition as to speak with mature consideration and due deliberation, and whether he spoke in regard to his legal rights, or whether he referred to and meant that defendant was not to blame for any

[2] S. v. Darrah, 152 Mo. 530, 54 S. W. 226.

[3] McMullen v. Clark, 49 Ind. 81. But see Keith v. S. 157 Ind. 386, 61 N. E. 716.

[3*] Burnett v. P. 204 Ill. 225.

[4] Flick v. Com. 97 Va. 766, 34 S. E. 42. Contra: Keith v. S. 157 Ind. 386, 61 N. E. 716.

willful intention to injure him or cause said accident, and then give his admission such meaning as you believe from all the circumstances he intended it to have, and give such weight to his statement or admission as in your judgment it may be entitled to. And the admission of deceased will not be conclusive as to what he states. But you will consider all the testimony in relation thereto as in your judgment the whole evidence will justify.[5]

§ 740. **Flight tends to prove guilt.**—(1) If the jury believe from the evidence that defendant, after he was charged with the crime alleged in the indictment, fled from justice, or while under recognizance forfeited the same on account of said charge, such conduct on the part of the defendant is evidence to be considered by the jury in determining his guilt or innocence.[6]

(2) Flight raises the presumption of guilt, and if you believe from the evidence that the defendant, after having shot and killed M as charged in the indictment, fled from the country and tried to avoid arrest and trial, you may take that fact into consideration in determining his guilt or innocence.[7]

(3) Flight is considered as evidence tending to prove the guilt of the accused. It is your privilege to look on it in that light. You may also look on it as evidence of fear of summary punishment at the hands of his pursuers. Weigh it carefully and give it the effect it reasonably should have under all the circumstances of the case.[8]

§ 741. **Flight is a circumstance only.**—(1) Evidence has been offered tending to show flight by the defendant from the state of Kansas to the state of Washington, at or about the time the complaint was filed charging him with the crime alleged against him in the information. If you find from the evidence that the defendant at or about the time the charge contained in the information was first preferred against him, fled to a distant part of the country, and that such flight was induced by such charge, this is a circumstance to be considered by you in connection

[5] Cooper v. Central R. Co. 44 Iowa, 137.
[6] S. v. Hayes, 78 Mo. 310.
[7] S. v. Gee, 85 Mo. 647.
[8] Com. v. Berchine, 168 Pa. St. 603, 32 Atl. 109.

with all the other evidence to aid you in determining his guilt or innocence.[9]

(2) Evidence has been introduced as to an attempted escape from jail by the defendant while in the custody of the sheriff on this charge. If you find from the evidence that the defendant did thus attempt to escape from custody, this is a circumstance to be considered by you in connection with all the other evidence to aid you in determining the question of his guilt or innocence.[10]

(3) The flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, is a circumstance not sufficient of itself to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him—the probability of his guilt or innocence. The weight to which this circumstance is entitled is a matter for the jury to determine in connection with all the facts and circumstances shown in the evidence.[11]

§ 742. **Defendant surrendering.**—The fact that when charged with the commision of a crime the defendant refuses to flee, but surrenders himself to the proper authorities, cannot be considered as showing his innocence of the offense charged.[12]

[9] S. v. Thomas, 58 Kas. 805, 51 Pac. 229. See S. v. Poe (Iowa), 98 N. W. 588.

[10] Anderson v. S. 104 Ind. 472, 4 N. E. 63, 5 N. E. 711.

[11] P. v. Forsythe, 65 Cal. 102, 3 Pac. 402.

[12] Walker v. S. (Ala.), 35 So. 1012. See, also, Waybright v. S. 56 Ind. 125. Defendant may explain his flight and its cause, Batten v. S. 80 Ind. 401.

CHAPTER LI.

ALIBI AS DEFENSE.

Sec.
743. Burden of proof.
744. Alibi raising a reasonable doubt.
745. High degree of proof in Illinois.

§ **743. Burden of proof.**—(1) When the state makes out such a case as would sustain a verdict of guilty, and the defendant offers evidence, the burden is upon him to make out his defense as to an alibi; and when the proof is all in, both that given for the defendant and for the state, then the primary question is (the whole evidence being considered), is the defendant guilty beyond a reasonable doubt?—the law being that if, after you have considered the evidence, as well that touching the alibi as the criminating evidence introduced by the state, you have a reasonable doubt of the guilt of the accused, you should acquit; if you have not, you should convict.[1]

(2) It is not incumbent on the defendant to prove an alibi beyond a reasonable doubt. Though the evidence introduced to establish an alibi falls short of the weight of moral certainty as to the existence or truth of the alibi, yet if he leaves in the minds of the jury such a doubt or uncertainty that, taken by itself, they could not find for or against the alibi, they are bound to carry such doubt into the case of the prosecution, and to array it there as an element of the reasonable doubt, beyond which the prosecution must establish guilt. The defendant is entitled as much

[1] S. v. Thornton (S. Dak.), 73 N. W. 196.

to the benefit of such doubt as to any other doubt raised by the evidence; and if the weight of the alibi, alone or added to that of any other, be sufficient to reduce belief in the minds of the jury as to the defendant's guilt to a reasonable doubt, they must acquit.[2]

(3) The burden of establishing an alibi is upon the defendants and the evidence introduced to sustain it should outweigh the evidence introduced by the state tending to show that the defendants participated in the crime charged. They are not bound to establish such defense beyond a reasonable doubt; but if, upon the whole case, the testimony raises in your minds a reasonable doubt that the defendants were present at the place where the assault was committed, that, of course, would create a reasonable doubt as to their guilt and would entitle them to an acquittal.[3]

§ 744. Alibi raising a reasonable doubt.—(1) One of the defenses interposed by the defendant in this case is an alibi; that is, that the defendant was at another place at the identical time the crime was committed, if committed at all. If in view of all the evidence you have any reasonable doubt as to whether the defendant was at another place from where the crime was committed at the time of its commission, then you should acquit; but if you believe from the evidence that the accused was not so far away from the place where the offense was committed, but that he could with ordinary exertion have reached the place where the offense was committed, then you will consider that fact as a circumstance tending to prove or disprove the alibi.[4]

(2) If there is any evidence before you which raises in your minds a reasonable doubt as to the presence of the defendant at the time and place where the crime is charged to have been committed, you must acquit him.[5]

[2] P. v. Fong Ah Sing, 64 Cal. 253, 28 Pac. 233, 11 Am. Cr. R. 33. See Shultz v. Ter. (Ariz.), 52 Pac. 352; Walters v. S. 39 Ohio St. 215; Peyton v. S. 54 Neb. 188, 74 N. W. 597.

[3] S. v. Fry, 67 Iowa, 478, 25 N. W. 738. See S. v. Kline, 54 Iowa, 185, 6 N. W. 184 (requiring preponderance of evidence by defendant). Contra: Shoemaker v. Ter. 4 Okla. 118, 43 Pac. 1059; Parker v. S. 136 Ind. 284, 35 N. E. 1104.

[4] S. v. Burton, 27 Wash. 528, 67 Pac. 1097. See McLain v. S. 18 Neb. 160, 24 N. W. 720.

[5] S. v. Adair, 160 Mo. 394, 61 S. W. 187; Thornton v. S. 20 Tex.

(3) You should not convict the defendant unless, after considering all the evidence introduced in this case, you are satisfied of his guilt beyond all reasonable doubt; and if, after considering all the evidence introduced by the prosecution, and all the evidence introduced by the defense, you entertain a reasonable doubt as to whether the defendant, M, has been identified as one of the persons present participating in the offense charged, you should find him not guilty.[6]

§ **745. High degree of proof required in Illinois.**—(1) In this case what is known as an alibi, that is, that the defendants and each of them were at another place at the time of the burning of the stacks, so far as the same is relied on by the defendants, to render the proof of an alibi satisfactory to the jury the evidence must cover the whole of the time of the setting of the fires, if the jury believe from the evidence said stacks were set on fire, so as to render it impossible or very improbable that the defendants, or any of them, could have committed the act.[7]

(2) You are to carefully scrutinize any evidence in relation to an alibi. An alibi is a defense that is easily proven and hard to disprove. Therefore, you will be careful and cautious in examining the evidence in regard to the defense of an alibi.[8]

App. 535; Casey v. S. 49 Neb. 403, 68 N. W. 643; Peyton v. S. 54 Neb. 188, 74 N. W. 597; Allen v. S. 70 Ark. 337, 68 S. W. 28.

[6] Mullins v. P. 110 Ill. 43, alibi was the defense in this case.

[7] Creed v. P. 81 Ill. 569; Miller v. P. 39 Ill. 464. See Mullins v. P. 110 Ill. 43; Waters v. P. 172 Ill. 373, 50 N. E. 148, this instruction is not good law, though sustained.

[8] P. v. Tice, 115 Mich. 219, 73 N. W. 108. An instruction which casts discredit on the defense of alibi is erroneous. Sater v. S. 56 Ind. 382; Albin v. S. 63 Ind. 598.

CHAPTER LII.

INSANITY AS DEFENSE.

Sec.
746. Every man presumed to be sane.
747. Insanity presumed to continue—When.
748. Ability to distinguish right from wrong.
749. No will power to refrain from act.
750. Will overcome by irresistible impulse.
751. Reasonable doubt of sanity.
752. Higher degree of proof required in some states.
753. Mere weakness of mind.
754. Defense of insanity, examined with care.
755. Drunkenness is not insanity.

§ **746. Every one presumed to be sane.**—The law presumes every man to be sane until the contrary is shown, and when insanity is set up as a defense by a person accused of crime, then, before the jury can acquit the accused on the ground of insanity, it must appear from the evidence in the case that at the time of the commission of the act the accused was not of sound mind, but affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged by overriding his reason and judgment.[1]

§ **747. Insanity presumed to continue—When.**—(1) A person who is insane only at intervals may, during a lucid interval, commit a crime and be responsible therefor, if the evidence shows beyond a reasonable doubt that, at the time of the commission of the crime charged, the person had sufficient mental capacity and will

[1] Dacy v. P. 116 Ill. 555, 570, 6 N. E. 165, this instruction does not require the defendant to prove insanity by a preponderance of the evidence. S. v. McCoy, 34 Mo. 535; S. v. Pagels, 92 Mo. 300, 10 N. W. 288.

power to make him criminally responsible under the law. It is not a question of whether he exercised sufficient will power or not, but the question is, did he possess sufficient will power at the time to resist the impulse to commit the crime, and could he have resisted had he tried?[2]

(2) When it appears from the evidence that insanity has once existed in the defendant, whether or not it will be presumed to continue depends on the nature of the malady. If it is of a permanent and chronic character, then it is presumed to continue to exist until the contrary appears from the evidence; but if the insanity is the result of physical disease, a weakened condition of the system, remorse, disappointment, shattered hopes, jealousy, an excited condition, strong passions, violent temper, or some other temporary or transient cause, and lucid intervals appear, then no presumption as to its continued existence is indulged, and the mental condition of the defendant at the time of the commission of the crime charged is to be ascertained by the jury from all the evidence and circumstances of the case.[3]

(3) If from a careful consideration of the facts and circumstances shown by the evidence in this case, you believe that the defendant, D, was insane and of unsound mind on the thirteenth day of May last, at late as twelve o'clock on that day, then the presumption of law is that that condition of mind continued up until after the shooting mentioned, between ten and eleven o'clock of that evening, as complained of in the indictment, unless you shall further believe from the evidence before you, beyond all reasonable doubt, that he had recovered from such insane condition of mind prior to the shooting.[4]

§ 748. **Ability to distinguish right from wrong.**—(1) If you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime in manner and form as charged in the indictment, and at the time of committing such act was able to distinguish right from wrong, you should find him guilty.[5]

[2] Wheeler v. S. 158 Ind. 700, 63 N. E. 975. This statement of the law is clear enough without defining "mental capacity."

[3] Wheeler v. S. 158 Ind. 701, 63 N. E. 975.

[4] Dacey v. P. 116 Ill. 573, 6 N. E. 165.

[5] Dunn v. P. 109 Ill. 635, 643. See S. v. Pagels, 92 Mo. 300, 10 N. W. 288.

(2) If you believe from the evidence, beyond a reasonable doubt, that at the time of committing the alleged act the defendant was able to distinguish right from wrong, then you cannot acquit him on the ground of insanity.[6]

(3) Was the accused a free agent in forming the purpose to kill? Was he at the time capable of judging whether his act was right or wrong? And did he know at the time that it was an offense against the laws of God and man?[7]

(4) But the unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and by nothing else, the accused should be acquitted.[8]

(5) If, from all the evidence in the case, you believe, beyond a reasonable doubt, that the defendant committed the crime of which he is accused in manner and form as charged in the indictment, and that at the time of the commission of such crime the defendant knew that it was wrong to commit such crime, and was mentally capable of choosing either to do or not to do, the act or acts constituting such crime, and of governing his conduct in accordance with such choice, then it is your duty, under the law, to find him guilty, even though you should believe, from all the evidence, that at the time of the commission of the crime he was not entirely and perfectly sane, or that he was greatly excited or enraged, or under the influence of intoxicating liquor.[9]

§ 749. **No will power to refrain from the act.**—If you find from the evidence that the mind of the respondent, at the time of the killing of Mamie Small, was diseased; that by reason of such mental disease his will power was then impaired; that by reason of such impairment of his will power so caused he did not then have sufficient will power to refrain from committing the

[6] Dunn v. P. 109 Ill. 635, 643; Queenan v. Ter. 11 Okla. 261, 71 Pac. 218; Homish v. P. 142 Ill. 624, 32 N. E. 677.

[7] Blackburn v. S. 23 Ohio St. 165.

[8] Hopps v. P. 31 Ill. 392.

[9] Dunn v. P. 109 Ill. 635, 643.

act; and that the act was the product of such mental disease, he was not responsible for the act, although he then had sufficient mental capacity and reason to enable him to distinguish between right and wrong as to the particular act he was doing.[10]

§ 750. **Will overcome by irresistible impulse.**—(1) If the act of G in assaulting the party, which is admitted to constitute a breach of the bond, was caused by mental disease or unsoundness which dethroned his reason and judgment with respect to that act—which destroyed his power rationally to comprehend the nature and consequence of that act, and which overpowering his will irresistibly forced him to its commission, then he is not legally answerable therefor. But if you believe from all the evidence and circumstances that he was in possession of a rational intellect and sound mind, and allowed his passions to escape control, then, though passion may for the time being have driven reason from her seat and usurped it, and have urged him with a force at the moment irresistible to desperate acts, he cannot claim for such acts the protection of insanity.[11]

(2) To be held criminally responsible a man must have reason enough to be able to judge of the character and consequences of the act committed, and he must not have been overcome by an irresistible impulse arising from disease.[12]

§ 751. **Reasonable doubt of sanity.**—(1) If, upon the whole evidence, the jury find that the defendant, at the time of committing the act, was not of sound mind, and was unconscious that he was committing a crime, they should acquit him. The fact of the soundness of mind at the time the act was committed is as much an essential ingredient of the crime of murder as the fact of killing, or of malice, or of any other fact or ingredient of murder, and should be made out in the same way by the same party, and by evidence of the same kind and degree, and as conclusive in its character as is required in making out any other fact, ingredient or element of murder. The burden of proof in a crim-

[10] S. v. Knight, 95 Me. 467, 50 Atl. 276, 55 L. R. A. 373, (this is a well considered case and sets out a full charge on the law of insanity in various forms.)

[11] S. v. Geddis, 42 Iowa, 271.

[12] S. v. Peel, 23 Mont. 358, 59 Pac. 169, citing and quoting from Dr. Clevenger's Med. Juris. p. 174.

inal case is always upon the state, and never shifts to the defendant; and the making out of a prima facie case against the defendant does not shift the burden of proof to the defendant. If a prima facie case is made out by the state against the defendant, then, in order to entitle the defendant to an acquittal, he is only required by evidence to establish a reasonable doubt of his sanity. If the jury cannot say beyond a reasonable doubt that the defendant was sane at the time of the commission of the alleged act, or cannot say whether, at the time, he was sane or insane, they are bound to acquit him.[13]

(2) If the evidence in the case is sufficient to raise a reasonable doubt as to the sanity of the defendant, then the jury will find the defendant not guilty.[14]

(3) To warrant a conviction in this case, it is incumbent on the people to establish by evidence, to the satisfaction of the jury, beyond all reasonable doubt, the existence of every element necessary to constitute the crime charged. And if, after a careful and impartial examination of all the evidence in the case bearing upon the question of sanity or insanity, the jury entertain a reasonable doubt of the sanity of the defendant at the time of the alleged offense, they should give him the benefit of such doubt and acquit him.[15]

(4) While the law presumes all men to be sane, yet this presumption may be overcome by evidence tending to prove insanity of the accused at the time of the commission of the alleged offense. When such evidence is introduced, then the presumption of sanity ceases, and the prosecution is bound to prove the sanity of the accused beyond a reasonable doubt. So, in this case, in which the defense of insanity is interposed, if the jury, after considering all the evidence, entertain a reasonable doubt of the sanity of the defendant at the time of the alleged offense, then he must be acquitted.[16]

(5) True it is, the law presumes every man to be sane and responsible for his acts until the contrary appears from the evi-

[13] S. v. Mahn, 25 Kas. 188; S. v. Nixon, 32 Kas. 213, 4 Pac. 159.

[14] Jamison v. P. 145 Ill. 357, 381, 34 N. E. 486; Hopps v. P. 31 Ill. 392; S. v. Mahn, 25 Kas. 186.

[15] Dacey v. P. 116 Ill. 555, 573, 6 N. E. 165.

[16] Jamison v. P. 145 Ill. 357, 380, 34 N. E. 486.

dence. Still, if there is any evidence in the case tending to rebut the presumption sufficient to raise a reasonable doubt on the issue of insanity, then the jury will find the defendant not guilty.[17]

(6) The law presumes that a man is of sound mind until there is some evidence tending to prove the contrary. In prosecutions charging violations of the criminal code, the accused is entitled to an acquittal if the evidence engenders a reasonable doubt as to his mental capacity at the time the alleged offense is charged to have been committed. Evidence rebutting or tending to rebut the presumption of sanity need not, to entitle the accused to an acquittal, preponderate in his favor. If the evidence raises in your minds a reasonable doubt of sanity it is sufficient.[18]

§ 752. **Higher degree of proof required in some states.**—(1) The plea of insanity is a complete defense to the crime charged if, from all the evidence before you, you believe the plea is sustained. The law presumes all men to be sane until insanity shall have been established by competent evidence to the satisfaction of the jury. It is not necessary, in order to acquit, that the evidence on the subject of insanity should satisfy you beyond a reasonable doubt that the defendant was insane; it is sufficient if, upon consideration of all the evidence, you are reasonably satisfied that he was insane. If the weight or preponderance of the evidence shows the insanity of the defendant, it raises a reasonable doubt of guilt.[19]

(2) To establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing.[20]

§ 753. **Mere weakness of mind.**—Mere weakness of mind does not excuse the commission of crime. If one is of sound mind he is to be held responsible for his criminal act, even though his mental capacity be weak or his intellect be of an inferior order.[21]

[17] Dacey v. P. 116 Ill. 573, 6 N. E. 165.

[18] Guetig v. S. 66 Ind. 106.

[19] S. v. Bruce, 48 Iowa, 534; S. v. McCoy, 34 Mo. 535.

[20] 2 Thompson, Tr. § 2525, citing Clark v. S. 8 Tex. App. 350; Smith v. S. 19 Tex. App. 96.

[21] Wartena v. S. 105 Ind. 450, 5 N. E. 20.

§ 754. Defense of insanity to be examined with care.—The defense of insanity is one which may be, and sometimes is, resorted to in cases where the proof of the overt act is so full and complete that any other means of avoiding conviction and escaping punishment seems hopeless. While, therefore, this is a defense to be weighed fully and justly, and when satisfactorily established, must recommend itself to the favorable consideration of the humanity and justice of the jury, they are to examine it with care, lest an ingenuous counterfeit of such mental disease or disorder should furnish protection to guilt.[22]

§ 755. Drunkenness is not insanity.—(1) Voluntary intoxication is no excuse for crime as long as the offender is capable of conceiving an intelligent design; he will be presumed, if the case is otherwise made out beyond a reasonable doubt, to have intended the natural and probable consequences of his own act.[23]

(2) Although it is the law in this state that a criminal offense consists in a violation of a public law, in the commission of which there must be a union or joint operation of act and intention, or criminal negligence, yet where, without intoxication, the law will impute to the act a criminal intent, as in the case of wanton killing without provocation, voluntary drunkenness is not available to disprove such intent.[24]

(3) If you believe from the evidence, beyond a reasonable doubt, each of the following propositions, to-wit: that at or about two hours before the commission of the alleged homicide the defendant was sane, and had the power to abstain from drinking alcohol; that the defendant then knew that the drinking of alcohol by him would have the effect to render him insane or crazy; that the defendant, so knowing the effect of alcohol upon him, and being sane, and having the power to abstain from taking alcohol, did then and there voluntarily drink alcohol; that the alcohol so drank by the defendant then and there made him insane or crazy; that while so insane or crazy from

[22] P. v. Donlan, 135 Cal. 489, 67 Pac. 761; P. v. Larrabee, 115 Cal. 159, 46 Pac. 922; P. v. Allender, 117 Cal. 81, 48 Pac. 1014. See McIntosh v. S. 151 Ind. 259. But see Aszman v. S. 123 Ind. 347, holding that an instruction which tends to discredit the defense of insanity is erroneous.

[23] Smurr v. S. 88 Ind. 507.

[24] Upstone v. P. 109 Ill. 169, 176.

the effects of such alcohol the defendant committed the act charged in the indictment, at the time and place, and in the manner and form therein charged, then you should find the defendant guilty.[25]

(4) If you believe from the evidence, beyond a reasonable doubt, that the defendant, when voluntarily intoxicated, committed the homicide charged in the indictment, under such circumstances as would have constituted such an act, by one not intoxicated, murder, then you are instructed that such intoxication would not reduce the crime from murder to manslaughter, nor would such intoxication be any excuse or defense to the act.[26]

(5) Frenzy arising solely from the passions of anger and jealousy, no matter how furious, is not insanity. A man with ordinary will power, which is unimpaired by disease, is required by law to govern and control his passions. If he yields to wicked passions, and purposely and maliciously slays another, he cannot escape the penalty prescribed by law, upon the ground of mental incapacity. That state of mind caused by wicked and ungovernable passions, resulting not from mental lesion, but solely from evil passions, constitutes that mental condition which the law abhors and to which the term malice is applied. The condition of mind which usually and immediately follows the excessive use of alcoholic liquors, is not the unsoundness of mind meant by law. Voluntary drunkenness does not even palliate or excuse.[27]

[25] Upstone v. P. 109 Ill. 169, 177.
[26] Upstone v. P. 109 Ill. 169, 177.
[27] Guetig v. S. 66 Ind. 94. As to effect of intoxication in disproving conspiracy and felonious intent not consummated, see Booher v. S. 156 Ind. 439.

CHAPTER LIII.

GOOD CHARACTER OF ACCUSED.

Sec.
756. Good character of defendant a circumstance.
757. Good character may create reasonable doubt.
758. Character of defendant presumed good.

§ 756. **Good character of defendant a circumstance.**—(1) Evidence has been given to the character of the defendant for peace and quietude. This evidence should be considered by you in determining the guilt or innocence of the defendant; but, if you should be satisfied from the evidence, beyond a reasonable doubt, of the guilt of the defendant as charged in the indictment, then, in that view of the case, although you may believe that he had a good character before the alleged offense occurred, if it did occur, that would not avail him as a defense or entitle him to be acquitted.[1]

(2) The defendant has put in evidence his general reputation for peaceableness; that such evidence is permissible under the law and is to be by the jury considered as a circumstance in the case. But the court further instructs the jury that if, from all the evidence in the case, they are satisfied beyond a reasonable doubt of the guilt of the accused, then it is the duty of the jury to find him guilty, notwithstanding the fact that heretofore the accused has borne a very good character for peaceableness.[2]

(3) Some evidence has been introduced by the defendants in re-

[1] Walker v. S. 136 Ind. 669, 36 N. E. 356; P. v. Samsels, 66 Cal. 99, 4 Pac. 1061. See Wagner v. S. 107 Ind. 71, 7 N. E. 896.

[2] Hirschman v. P. 101 Ill. 568. 575. Held not erroneous as telling the jury to disregard the evidence of good character.

gard to their character for honesty. This evidence should be considered by you as tending to establish a defense. If, however, you should be satisfied beyond a reasonable doubt of the guilt of the defendants, after a full consideration of all the evidence in the case, including the testimony in regard to their character for honesty, then in the view of the case, though you might believe that the defendants had a good character for honesty before the alleged crime, that would not avail them as a defense or entitle them to an acquittal.[3]

(4) In determining the guilt or innocence of the defendant, you should take into account the testimony in relation to his character for honesty, integrity, and veracity, and you should give to such testimony such weight as you deem proper, but if, from all the evidence before you, you are satisfied beyond a reasonable doubt, as defined in these instructions, that the defendant is guilty, then his previous good character, if shown, cannot justify, excuse palliate or mitigate the offense, and you cannot acquit him merely because you may believe he has been a person of good repute.[4]

(5) The character of the defendant is also a matter for your consideration. The evidence as to his character should be given such weight, in explanation of the transaction between himself and the deceased, as to you shall seem proper. But, if you shall conclude, from all the evidence, that the defendant is guilty, you should not acquit him because you may believe that he has heretofore been a person of good repute.[5]

(6) The defendant has a right to show his previous good character as a circumstance tending to show the improbability of his guilt. If, however, you believe from the evidence, beyond a reasonable doubt, that the defendant committed the crime as charged in the indictment, then you should find him guilty, even though the evidence satisfies your minds that the defendant, previous to the commission of the alleged crime, has sustained a good reputation as a peaceable and law-abiding citizen.[6]

(7) Whilst the jury may take into consideration the previous good character of defendant, together with all the other facts and circumstances of the case adduced in evidence, in determining

[3] McQueen v. S. 82 Ind. 74 (robbery).

[4] S. v. Darrah, 152 Mo. 531, 54 S. W. 226.

[5] S. v. Vansant, 80 Mo. 70.

[6] S. v. Porter, 32 Ore. 135, 49 Pac. 964.

whether or not defendant is guilty of the offense charged in the indictment, yet if from the whole testimony, they believe defendant is guilty, then his previous good character neither justifies, mitigates, nor excuses the offense.[7]

For the Defense.

§ 757. **Good character may create a reasonable doubt.**—(1) You are instructed that evidence of the good character of the defendant is competent to be taken into consideration by you in determining his guilt or innocence. The good character of the accused, when satisfactorily established, may, of itself, create such a reasonable doubt in the minds of the jury as will justify an acquittal.[8]

(2) In a case involved in much doubt, the good character of the accused, abundantly proved, is entitled to great weight, and may of itself create such a reasonable doubt as will justify an acquittal.[9]

(3) Good character of itself may, in connection with all the evidence, generate a reasonable doubt and entitle the defendant to an acquittal, though without such proof of good character you would convict.[10]

(4) The good character of the accused, when satisfactorily established by competent evidence, is an ingredient which ought always to be considered by the jury, together with the other facts and circumstances in the case, in determining his guilt or innocence.[11]

§ 758. **Character of defendant presumed good.**—(1) The law presumes that a person charged with a commission of a criminal offense has a good character or reputation until the contrary is shown by the evidence; and the jury have no right to consider the omission, on the part of the defendant, to introduce evidence of

[7] S. v. Jones, 78 Mo. 283.

[8] Aneals v. P. 134 Ill. 415, 25 N. E. 1022; Bryant v. S. (Ala.), 23 So. 40.

[9] Walsh v. P. 65 Ill. 64; Aneals v. P. 134 Ill. 415, 25 N. E. 1022.

[10] Bryant v. S. (Ala.), 23 So. 40. Booker v. S. 76 Ala. 25; P. v. Elliott, 163 N. Y. 11, 57 N. E. 103.

[11] Felix v. S. 18 Ala. 725.

good character as a circumstance against him, or as tending to prove his guilt.[12]

(2) Where a person is charged with the commission of a crime, the failure to call witnesses to prove his general good character raises no presumption against it.[13]

[12] S. v. Tozier, 49 Me. 404; Dryman v. S. 102 Ala. 130, 15 So. 433; Hughes Cr. Law, § 3156; Underhill Cr. Ev. § 76.

[13] S. v. Dockstader, 42 Iowa, 436, 2 Am. Cr. R. 469, citing S. v. Kabrick, 39 Iowa, 277; S. v. Oilkill, 7 Ired. L. (N. Car.) 251; P. v. White, 24 Wend. (N. Y.) 520; Dryman v. S. 102 Ala. 130, 15 So. 433; Underhill Cr. Ev. § 76.

CHAPTER LIV.

CRIMINAL OFFENSES—CONSPIRACY.

Sec.
759. Conspiracy defined.
760. Formal agreement unnecessary.
761. All responsible for result of design.
762. Conspiracy to commit robbery.
763. Declarations of one evidence against all.
764. Principal and accessory, distinction abrogated.
765. Aiding and abetting.

§ 759. **Conspiracy defined.**—A conspiracy is a combination of two or more persons, by some concert of action, to accomplish some criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means.[1]

§ 760. **Formal agreement unnecessary.**—(1) While it is necessary, in order to establish the existence of a conspiracy, to prove a combination of two or more persons by concert of action to accomplish a criminal or unlawful purpose, yet it is not necessary to prove that the conspirators came together and entered into a formal agreement to effect such purpose; that such common design may be regarded as proved if the jury believe from the evidence that the parties to such conspiracy were actually pursuing in concert the common design or purpose, whether acting separately or together, by common or different means, provided that all were leading to the same unlawful result.[2]

[1] Smith v. P. 25 Ill. 11; Hardin v. S. 4 Tex. Cr. App. 364.

[2] Musser v. S. 157 Ind. 442, 61 N. E. 1, 3 Greenleaf Ev. § 93; Wharton Cr. Law, 9th ed. §§ 1398, 1399, 1401; McKee v. S. 111 Ind. 378, 383, 12 N. E. 510; Kelly v. P. 55 N. Y. S. 565, 14 Am. R. 342; P.

(2) Evidence in proof of a conspiracy will generally be circumstantial, and it is not necessary, for the purpose of showing the existence of the conspiracy, for the state to prove that the defendant and some other person or persons came together and actually agreed upon a common design or purpose, and agreed to pursue such common design and purpose in the manner agreed upon. It is sufficient if such common design and purpose is shown to your satisfaction by circumstantial evidence.[3]

(3) While the law requires that, to find the defendants guilty in this case, the evidence should show that they were acting in concert, still it is not necessary that it should be positively proved that they actually met together and agreed to rob R. Such concert of action may be proved from circumstances, and if, from the evidence, the jury are satisfied that the defendants acted together, each aiding in his own way, it would be sufficient.[4]

§ 761. All responsible for results of design.—(1) If two or more persons conspire together to do an unlawful act, and in the prosecution of the design an individual is killed, or death ensue, it is murder in all who enter into or take part in the execution of the design. But if the unlawful act be a trespass only, to make all guilty of murder the death must happen in the prosecution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although death happens collaterally or beside the original design.[5]

(2) If you believe from the evidence that the defendant, and other persons acting with him, entered into a conspiracy to kill the deceased, W, and that in pursuance of such formed design the defendant, and others acting with him, did, at or about the time and at the place alleged in the indictment, shoot and kill the said W, you will find the defendant guilty of murder in the first degree.[6]

§ 762. Conspiracy to commit robbery.—If you should believe from the evidence that there was a conspiracy to commit rob-

v. Arnold, 46 Mich. 268, 9 N. W. 406; Dayton v. Monroe, 47 Mich. 193, 10 N. W. 196; Spies v. P. 122 Ill. 1, 12 N. E. 868, 17 N. E. 898.

[3] Musser v. S. 157 Ind. 442, 61 N. E. 1. (The common design mentioned in this instruction should be shown not only to the satisfaction of the jury, but also beyond a reasonable doubt.)

[4] Miller v. P. 39 Ill. 464.

[5] S. v. Shelledy, 8 Iowa, 484.

[6] Hardin v. S. 4 Tex. App. 365.

bery, and that the same was undertaken, and that B was killed, yet if you have a reasonable doubt whether such general purpose was contemplated and assented to by the defendant, or whether it was done, if at all, by his knowledge, and in furtherance of a common design to commit said offense; or if you have a reasonable doubt of the defendant's identity as one of the persons engaged in said robbery, if any was committed, or if you have a reasonable doubt of the presence of the defendant at the time and place of the robbery, if any was committed—in either event you should find him not guilty.[7]

§ 763. **Declarations of one evidence against all.**—Where two or more persons conspire to do, and are associated for the purpose of doing, an unlawful act, the act or declaration of one of such persons while engaged in and in the pursuance of the common object, is the act and declaration of all, for which all are liable, as each person so associated is deemed or presumed to have assented to, or commanded, what was done by any other of the conspirators in furtherance of the common object.[8]

§ 764. **Principal and accessory, distinction abrogated.**—(1) The distinction between an accessory before the fact and the principal, and between principals in the first and second degree in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, must be prosecuted, tried and punished as principals, and no other facts need be alleged or proved under an information against such accessory than are required under an information against the principal.[9]

(2) An accessory to the commission of a felony may be prosecuted, tried and punished, though the principal may be neither prosecuted nor tried.[10]

§ 765. **Aiding and abetting.**—(1) All persons who are guilty of acting together in the commission of an offense are principals.

[7] Nite v. S. 41 Tex. Cr. App. 340, 54 S. W. 767.

[8] S. v. Shelledy, 8 Iowa, 486; Hardin v. S. 4 Tex. App. 365.

[9] S. v. De Wolfe (Mont.), 77 Pac. 1087.

[10] S. v. De Wolfe (Mont.), 77 Pac. 1087, Ulmer v. S. 14 Ind. 52; Ind. Acts, 1889, p. 260.

When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts, or encourage by words or gestures, those actually engaged in the commission of the unlawful act, such persons so aiding or encouraging are principal offenders, and may be prosecuted and convicted as such.[11]

(2) All persons concerned in the unlawful assembly are equally guilty of the subsequent acts done by any of them in furtherance of the common objects of the assembly; and all joining them after the original meeting, and who were present at any subsequent act, and were either active in doing, countenancing, or supporting, or ready, if necessary, to support or aid in the doing of the unlawful act, thereby became parties to the alleged riot, and are equally guilty of all subsequent acts in the commission of the offense.[12]

(3) The bare presence of the defendant at the time of the taking of the property in question, if he was present, would not justify his conviction, unless the evidence shows that he did some act aiding, abetting, assisting, or encouraging the person who actually did steal the property.[13]

[11] Pierce v. S. 17 Tex. App. 239.

[12] U. S. v. Fenwick, 4 Cranch (U. S.) 680.

[13] Jackson v. S. 20 Tex. Cr. App. 192.

CHAPTER LV.

ASSAULTS.

Sec.
766. Simple assault defined.
767. Assault with deadly weapon.
768. Assault with intent to kill.
769. Assault to commit rape.
770. Consent to sexual intercourse.
771. Consent a question of fact.
772. Assault to rob.

§ 766. **Simple assault defined.**—(1) An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.[1]

(2) By the expression, "coupled with the ability to commit a battery," is meant that the person making the assault must at that time be in such position, and within such distance of the person assaulted, as to enable him to commit a battery on such person by the means used.[2]

(3) The use of any unlawful violence upon the person of another, with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery, or any threatening gesture, showing in itself, or by words accompanying it, an immediate intention coupled with the present ability to commit a battery, is an assault.[3]

§ 767. **Assault with a deadly weapon.**—(1) An assault and battery becomes aggravated when a serious bodily injury is inflicted upon the person assaulted, or when committed with a dead-

[1] May v. P. 8 Colo. 226, 6 Pac. 816; McCully v. S. 62 Ind. 433; Hurd's Ill. Stat. § 20, chap. 38.

[2] Perrin v. S. (Tex. Cr. App.), 78 S. W. 932.

[3] Perrin v. S. (Tex. Cr. App.), 78 S. W. 932.

ly weapon. A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury.[4]

(2) If you believe from the evidence that the defendant and the prosecuting witness, B, got into a fight, and that the defendant cut the witness without intent to do so, then you will find the defendant not guilty.[5]

§ 768. **Assault with intent to kill.**—(1) If the defendant fired into the crowd in question, of which A, the prosecuting witness, was one, with the deliberate intention, either formed at the time or previously, of killing or murdering some one of the crowd, and that A received a portion of the shot and contents of the gun and was wounded thereby, it is sufficient to establish the assault and battery with the intent charged. And if the case is otherwise made out it will be the duty of the jury to find the defendant guilty as charged in the indictment.[6]

(2) If you should find from the evidence that had death resulted from the assault, the killing would have been manslaughter only, then you should find the defendant guilty of assault and battery only, and not guilty of assault with intent to kill. But if you should find that such killing, had death resulted, would have been murder in the first degree, or murder in the second degree, then you should find the defendant guilty as charged in the indictment.[7]

§ 769. **Assault to commit rape.**—(1) If the state has satisfied you beyond a reasonable doubt that the defendant either had sexual intercourse with the prosecuting witness, or that he laid his hands upon her with the intent and purpose of having sexual intercourse with her, and that she was under fourteen years of age, then the state made out a case.[8]

(2) If you are satisfied from the evidence, beyond a reasonable doubt, that the defendant took hold of the prosecutrix, it is for you to say whether or not, under all the circumstances, the intention to have intercourse with the girl was then in his mind, and it was with that purpose that he laid his hands on her.[9]

[4] Perrin v. S. (Tex. Cr. App.), 78 S. W. 932.

[5] Ter. v. Baca (N. Mex.) 71 Pac. 460.

[6] Walker v. S. 8 Ind. 292.

[7] S. v. Stout, 49 Ohio St. 281, 30 N. E. 437.

[8] Hanes v. S. 155 Ind. 120, 57 N. E. 704.

[9] Hanes v. S. 155 Ind. 112, 57 N. E. 704. Held not objectionable as authorizing the jury to infer particular intent.

(3) If the jury believe from the evidence that the defendant, Hadley, had intercourse with Alma Grugin in the year 1896, and that she was then unmarried, of previously chaste character, and under the age of eighteen years, then said Hadley is guilty of felony, and this is true, even though you may further find that she consented to such intercourse.[10]

§ 770. **Consent to sexual intercourse.**—On the question of consent the court instructs you that consent induced by fear of personal violence is no consent, and though a man lay no hands on a woman, yet if, by physical force, he so overpowers her mind that she does not resist, he is guilty of rape by having the unlawful intercourse in such manner.[11]

§ 771. **Consent a question of fact.**—If you find from the evidence in this case that an act of sexual intercourse did take place between the defendant and the prosecuting witness, as charged in the indictment, the question as to whether or not the prosecuting witness voluntarily consented to such act is a question of fact for you to determine from all the evidence in the case.[12]

§ 772. **Assault to rob.**—(1) If you find that the defendant had not used such force and violence as makes him guilty of assault with intent to rob, he may be found guilty of assault and battery.[13]

(2) Violence, in order to constitute an assault with intent to rob, must not be subsequent to the attempt to take the property in question.[14]

Robbery is the felonious and violent taking of money, goods, or other valuable things from the person of another, by force or intimidation.[15]

(3) Robbery is the felonious and violent taking of money, goods, or other valuable thing from the person of another by force or intimidation. Every person guilty of robbery shall be imprisoned in the penitentiary not less than one nor more than fourteen years; or, if he is armed with a dangerous weapon, with intent,

[10] S. v. Grugin (Mo.), 42 L. R. A. 774, 781.

[11] Felton v. S. 139 Ind. 540, 39 N. E. 228.

[12] Anderson v. S. 104 Ind. 470, 4 N. E. 63, 5 N. E. 711. See Hawkins v. S. 136 Ind. 634, 36 N. E. 419.

[13] Hanson v. S. 43 Ohio St. 378, 1 N. E. 136.

[14] Hanson v. S. 43 Ohio St. 378.

[15] Fitzgerald v. S. 20 Tex. Cr. App. 294, 296.

if resisted, to kill or maim such person, or being so armed, he wounds or strikes him, or if he has any confederate present so armed, to aid or abet him, he may be imprisoned for any term of years or for life.[16]

(4) The fact that the defendant took the property in question from the person, and that it was afterwards found in his possession, is not sufficient to convict him of robbery. You must further find from the evidence, beyond a reasonable doubt, that the defendant took it from the person mentioned by force, and in spite of his resistance, with the intent to rob or steal, and unless you do so find you must find the defendant not guilty.[17]

[16] Needham v. P. 98 Ill. 279 (proper as defined by the statute of Illinois).

[17] Stevens v. S. 19 Neb. 650, 28 N. W. 304.

CHAPTER LVI.

HOMICIDE, MURDER AND MANSLAUGHTER.

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§ 773. **Definition and illustrative case.**—(1) Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied by law.[1]

(2) Murder in the first degree is the killing of a human being, willfully, deliberately, premeditatedly, and with malice aforethought.[2]

(3) Murder in the second degree has all the elements of murder in the first degree except that of deliberation.[3]

(4) If a man happen to kill another in the execution of a ma-

[1] Jackson v. P. 18 Ill. 270.
[2] S. v. May, 172 Mo. 630, 72 S. W. 918.
[3] S. v. May, 172 Mo. 630, 72 S. W. 918.

licious and deliberate purpose to do him a personal hurt by wounding or beating him, or in the wilful commission of any unlawful act which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other—as by committing a riot—shall be adjudged guilty of murder.[4]

(5) You are further instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, with malice aforethought, either expressed or implied, inflicted upon the deceased the mortal wounds in manner and form as charged in the indictment, not in self-defense, as the same is defined in these instructions, and not upon a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible, and that the said H did thereafter die from said mortal wound or wounds in manner and form as charged in the indictment, then the jury should find the defendant guilty of murder.[5]

(6) If the jury believe from the evidence in the case, beyond all reasonable doubt, that Belle Bowlby received, on the nineteenth day of February, 1895, the injuries by the means and in the manner set forth in the first, second or third counts of the indictment herein, and further believe from the evidence, beyond all reasonable doubt, that said injuries were inflicted upon the person of said Belle Bowlby by the defendant, Albert Wallace, as charged in the indictment, or in some of said counts thereof, and further believe from the evidence, beyond all reasonable doubt, that the death of said Belle Bowlby was occasioned by reason of said injuries at the time and in the manner charged in said indictment, or in some of said counts thereof, then in that state of the proof the law would pronounce it murder.[6]

(7) If you are satisfied from the evidence in this case, beyond a reasonable doubt, that the poison charged was administered by the defendant, as charged in the indictment, for the purpose of killing and murdering his wife, and that death ensued as alleged

[4] P. v. Abbott, 116 Mich. 263, 74 N. W. 529, citing 1 Hawk. P. C. (Curw. ed.), § 10, p. 86.

[5] Carle v. P. 200 Ill. 494, 66 N. E. 32. Held distinguishable from Steiner v. P. 187 Ill. 244, 58 N. E. 383; Panton v. P. 114 Ill. 505, 2 N. E. 411; Lyon v. P. 170 Ill. 527, 48 N. E. 964; Crowell v. P. 190 Ill. 508, 60 N. E. 872.

[6] Wallace v. P. 159 Ill. 446, 451, 42 N. E. 771.

in the indictment in consequence thereof, this will be sufficient to warrant you in convicting the defendant.[7]

§ 774. **Murder in first degree—Illustrations.**—(1) If you shall find and believe from the evidence that at the county of Jackson, in the state of Missouri, at any time prior to the thirty-first day of May, 1883, the day on which the indictment in this case was filed, the defendant, V, in the manner and by the means specified in the indictment willfully, with deliberation, premeditation, and malice aforethought, assaulted and wounded the deceased, A, and that within one year and a day thereafter, and before the filing of the indictment, the said A, at the county and state aforesaid, died from the effects of the wound so inflicted upon him by the defendant, the verdict should be that the defendant is guilty of murder in the first degree.[8]

(2) If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, A, in H county, Missouri, on or about the sixteenth day of December, 1899, with a certain pistol willfully, deliberately, premeditately, and of his malice aforethought, shot and killed Henry Hughes, then the jury will find the defendant guilty of murder in the first degree, and will so state in your verdict.[9]

§ 775. **Murder in the second degree.**—(1) If you shall believe from the evidence that the defendant shot and killed M while he, the defendant, was in a violent passion, suddenly aroused by opprobrious epithets or abusive words spoken by M to the defendant, then such shooting and killing was not done with deliberation, and was not murder in the first degree. On the other hand, although the defendant shot and killed M while the defendant was in a violent passion suddenly aroused by opprobrious epithets or abusive words spoken to him by M, yet if such shooting and killing was done willfully, premeditatedly, and of his malice aforethought, as heretofore explained, then the defendant is guilty of murder in the second degree.[10]

(2) If you shall believe from the evidence beyond a reasonable

[7] Dyer v. S. 74 Ind. 595.

[8] S. v. Vansant, 80 Mo. 67. See Koerner v. S. 98 Ind. 8.

[9] S. v. Ashcraft, 170 Mo. 409, 70 S. W. 899. Full charge set out and held not error.

[10] S. v. Gee, 85 Mo. 649.

doubt, that the defendant, at the time and place mentioned in the indictment, with a pistol willfully, premeditatedly, and of his malice aforethought, but without deliberation, shot and killed M., you will find him guilty of murder in the second degree, and assess his punishment in the penitentiary for a term not less than ten years.[11]

§ 776. **Malice defined—Essential element.**—(1) Malice is the dictate of a wicked, depraved and malignant heart.[12]

(2) By malice is meant not only anger, hate, and revenge, but any other unlawful and unjustifiable motive.[13]

(3) Malice includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill will towards an individual, but is intended to denote an action flowing from any wicked and corrupt motive—an act done with a wicked mind—where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart.[14]

(4) Premeditated malice is where the intention to unlawfully take life is deliberately formed in the mind, and that determination meditated upon before the fatal stroke is given. There need be no appreciable space of time between the formation of the intention to kill and the killing. They may be as instantaneous as successive thoughts. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation and premeditation on the part of the slayer.[15]

(5) Malice, in law, and as used in the statute defining murder, has a technical meaning, including not only anger, hatred and re-

[11] S. v. Gee, 85 Mo. 648.

[12] S. v. Conley, 130 N. Car. 683, 41 S. E. 534. (The full charge of the court is set out in this case presenting every phase of murder in the first and second degrees and manslaughter and self-defense, following the settled precedents.)

[13] S. v. Hunter, 118 Iowa, 686, 92 N. W. 872; Com. v. Webster, 5 Cush. (Mass.) 304, 52 Am. Dec. 711. See S. v. Gee, 85 Mo. 649.

[14] Jackson v. P. 18 Ill. 269; McCoy v. P. 175 Ill. 224, 229, 51 N. E. 777; S. v. May, 172 Mo. 630, 72 S. W. 918. Held that the words every other unlawful and unjustifiable motive do not broaden the instruction to include every motive, whether growing out of the evidence in the case or not.

[15] Bims v. S. 66 Ind. 433; Koerner v. S. 98 Ind. 8.

venge, but every other unlawful and unjustifiable motive. It is not confined to ill will towards one or more individual persons, but is used and intended to denote an action growing from any wicked and corrupt motive—a thing done with bad or malicious intent—where the fact has been attended by such circumstances as carry in them the plain indication of a heart regardless of social duty and fatally bent on mischief; and therefore malice is implied from any deliberate and cruel act against another, however sudden.[16]

§ 777. **Intent presumed from means used.**—(1) Every man is presumed to intend the natural and probable consequences of an act which he intentionally performs; and if you find from the evidence that the defendants perpetrated an assault and battery upon B, and did throw him, the said B, from a rapidly moving railroad train in such a manner that it was reasonably calculated to destroy his life, then you are at liberty to infer that the defendants intended to kill him, the said B, from such facts.[17]

(2) In a case of homicide, the law presumes malice from the use of a deadly weapon, and casts on the defendant the onus of repelling the presumption of malice unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is unrebutted by the circumstances of the killing or by the evidence, there can be no conviction for any degree of homicide less than murder.[18]

(3) In a case of homicide the law presumes malice from the use of a deadly weapon, and casts on the defendant the onus of repelling the presumption, unless the evidence which proves the killing shows also that it was perpetrated without malice; and whenever malice is shown, and is unrebutted by the circumstances of the killing, or by other facts in evidence, there can be no conviction for any less degree of homicide than murder.[19]

(4) The law presumes that every sane person contemplates the natural and ordinary consequences of his own voluntary acts, until the contrary appears, and when a man is found to have killed another by acts, the natural and ordinary consequences of

[16] Harris v. S. 155 Ind. 271, 58 N. E. 75.

[17] Anderson v. S. 147 Ind. 451, 46 N. E. 901.

[18] Sherrill v. S. (Ala.), 35 So. 131.

[19] Jenkins v. S. 82 Ala. 27, 2 So. 150.

which would be death, if the facts and circumstances of the homicide do not of themselves, or the evidence otherwise, show that it was not done purposely, or create a reasonable doubt thereof, it is to be presumed that the death of the deceased was designed by the slayer.[20]

(5) Every person is presumed to intend what his acts indicate his intention to have been, and if the defendant fired a loaded pistol at the deceased, and killed him, the law presumes that he intended to kill the deceased, and unless the defendant can show that his intention was other than his act indicated the law will not hold him guiltless.[21]

(6) If an act be perpetrated with a deadly weapon, and so used as to be likely to produce death, the purpose or intent to kill may be inferred from such act.[22]

(7) If a deadly weapon is used, the law infers an intent to kill or to do grievious bodily harm; and if the circumstances do not show excuse, justification, or immediate provocation, the presumption of malice is conclusively drawn. A deadly weapon is not one from which a blow could ordinarily produce death, but one from which, as it was used in the particular case, death would probably result.[23]

(8) The instrument or means used by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.[24]

(9) Where a homicide is prepetrated by an intentional use of a deadly weapon, in such a manner as is likely to, and actually does, produce death, the law presumes such killing was committed purposely and maliciously, unless it was done in self-defense, or in a sudden heat caused by such provocation as by law reduces the killing to the grade of manslaughter.[25]

[20] S. v. Achey, 64 Ind. 59.

[21] P. v. Langton, 67 Cal. 427, 7 Pac. 843, Am. Cr. R. 439. If the evidence of either side shows the intention of the defendant was other than his act indicated, he should be held guiltless. The defendant should not be required to show his innocence.

[22] Deilks v. S. 141 Ind. 26, 40 N. E. 120; S. v. Zeibart, 40 Iowa, 173.

[23] Jenkins v. S. 82 Ala. 27, 2 So. 150.

[24] Perrin v. S. (Tex. Cr. App.), 78 S. W. 932.

[25] McDermott v. S. 89 Ind. 193.

§ 778. **Intent in administering drug.**—If you find from the evidence that the defendant administered to S I cantharides, for the purpose of exciting her sexual passions, and thereby, and by means thereof, enabling him more easily to have sexual intercourse with her, the said S I, and death resulted from such administration by the defendant, without any intention or purpose to kill the said S I, then under that state of facts you cannot convict the defendant of murder.[26]

§ 779. **Drunkenness, reducing grade of crime.**—(1) While voluntary intoxication is no excuse or palliation for the commission of a crime, yet if, upon the whole evidence in this case, you shall have a reasonable doubt whether, at the time of the killing—if you shall find from the evidence that the accused did kill the deceased—he had sufficient mental capacity to deliberately think upon and rationally determine so to kill the deceased, then you cannot find him guilty of murder of the first degree, although such inability was the result of intoxication.[27]

(2) It is a general principle of law that intoxication is no excuse for crime, but this principle has this important qualification, as far as it relates to murder in the first degree: A particular or specific intent is absolutely essential in the commission of this crime, and if the mind of the person doing the killing is unable, because of intoxication at the time of the killing, to form this particular or specific intent, there can be no murder in the first degree unless the person doing the killing became voluntarily intoxicated for the purpose of killing while intoxicated.[28]

(3) While drunkenness is no excuse for the commission of a criminal offense, unless occasioned by the fraud or contrivance of another for the purpose of causing the perpetration of an offense, yet if the drunkenness of the defendant be a fact appearing in the evidence it is to be considered by the jury in connection with all

[26] Bachtelheimer v. S. 54 Ind. 134. It was pointed out in this case that to constitute murder in either the first or second degree it is essential that the killing be "purposely and maliciously" done. But this case is not believed to be good law, since such an act would clearly amount to causing death by "purposely and with premeditated malice" administering poison, which is also murder by the Indiana law, under another section of the statute.

[27] Aszman v. S. 123 Ind. 351, 24 N. E. 123.

[28] Cook v. S. (Fla.), 35 S. 669.

the other facts proven, in determining the degree of guilt, if the defendant is guilty. The fact that the defendant was drunk, if proven, does not render his act any the less crimnial, and in this sense drunkenness is not available as an excuse, but, upon the question whether the act was deliberate or premeditated it is proper to be considered, but only for this purpose. It neither excuses the offense nor avoids the punishment which the law prescribes when the character of the offense is ascertained.[29]

§ 780. **Time of deliberation, length immaterial.**—(1) If you believe from the evidence, beyond a reasonable doubt, that the defendant, in C county, this state, before the finding of the indictment in this case, purposely killed W, after reflection, with a wickedness or depravity of heart towards the deceased, and the killing was determined on beforehand—even a moment before the fatal shooting was done—then the defendant is guilty of murder in the first degree.[30]

(2) It is not essential that the willful intent, premeditation and deliberation shall exist in the mind of the slayer for any considerable length of time before the actual perpetration of the crime. It is sufficient if there was a fixed design or determination to maliciously kill, distinctly formed in the mind of such slayer at any time before the fatal injury inflicted. And in this case, if the jury believe from the evidence, beyond a reasonable doubt, that the defendant assaulted and shot the deceased at the time and place and in the manner charged in the indictment, and that either at some time before, or in the moment or instant of time immediately before the fatal shot was fired, the defendant had framed in his mind a willful, deliberate and premeditated design or purpose of his malice aforethought to take the life of the deceased, and that the said fatal shot was fired by the defendant in furtherance of that design or purpose, without any justifiable cause or lawful excuse therefor, then it may be said that the defendant acted with deliberation and premeditation, and you should find him guilty of murder in the first degree. But if you fail to find from the evidence, beyond a reasonable doubt, that the said fatal act of the defendant was accompanied with some degree of deliberation and premeditation, or that it

[29] May v. P. 8 Colo. 220, 6 Pac. 816. See Booher v. S. 156 Ind. 435.

[30] Stevens v. S. (Ala.), 35 So. 124.

was the result of a fixed determination on the part of the defendant to kill the deceased, you must then acquit the defendant of the crime of murder in the first degree.[31]

§ 781. **Motive, proper but not indispensable.**—(1) Proof of motive to commit crime is not indispensable nor essential to conviction. While a motive may be shown as a circumstance to aid in fixing the crime on the defendant, yet the state is not required to prove a motive on the part of the defendant in order to convict, and the jury would be justified in inferring a motive from the commission of the crime itself, if the commission of the crime by the defendant is proved beyond every reasonable doubt, as required by law, and you find that the defendant, at the time of the commission of said act was sane, and there were no extenuating circumstances.[32]

(2) If the evidence fails to show any motive on the part of the accused to commit the crime charged, this is a circumstance in favor of his innocence which the jury ought to consider, together with all the other facts and circumstances, in making up their verdict.[33]

(3) The absence of all evidence of an inducing cause or motive to commit the crime, when the fact is in reasonable doubt as to who committed it, affords a strong presumption of innocence.[34]

§ 782. **The killing being proved, presumed murder.**—(1) The killing being proved to have been done by the defendant, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless by proof on the part of the prosecution it is sufficiently manifest that the offense committed only amounted to manslaughter, or that the accused was justified or excused in committing the homicide.[35]

(2) If the killing of the person mentioned in the indictment has been satisfactorily shown by the evidence, beyond all reasonable doubt, to have been the act of the defendant, then the law presumes it to have been murder, provided the jury further

[31] S. v. McPherson, 114 Iowa, 492, 87 N. W. 422.

[32] Wheeler v. S. 158 Ind. 700, 63 N. E. 975. Insanity was the defense in this case.

[33] Clough v. S. 7 Neb. 344.

[34] Vaughan v. Com. 85 Va. 672, 8 S. E. 584.

[35] Allen v. S. 70 Ark. 337, 68 S. W. 28. (Held not assuming that the defendant did the killing.)

believe from the evidence, beyond a reasonable doubt, that no circumstances existed excusing or justifying the act, or mitigating it so as to make it manslaughter.[36]

(3) The law presumes a sober man intends to do what he actually does, but the law does not presume a killing was done with premeditated design. This, like every other element of murder in the first degree, is to be inferred by the jury from the facts proved beyond a reasonable doubt.[37]

§ 783. **Doubt as to degree of homicide.**—(1) If the jury have a reasonable doubt growing out of the evidence as to whether the killing was done deliberately, or as to whether it was done premeditatedly, then they cannot find the defendant guilty of murder in the first degree; and if they have a reasonable doubt growing out of the evidence as to whether the killing was done out of malice, they cannot find the defendant guilty of murder in either degree, but only of manslaughter, if guilty at all; and if, after considering all the evidence, the jury have a reasonable doubt as to the defendant's guilt of manslaughter, arising out of any part of the evidence, then they should find the defendant not guilty.[38]

(2) If the jury have a reasonable doubt as to whether the killing was done deliberately, or as to whether it was done premeditatively, then they cannot find the defendant guilty of murder in the first degree; and if they have a reasonable doubt as to whether the killing was done in malice, then they cannot find the defendant guilty of murder in either degree, but only of manslaughter at most; and if, after considering all the evidence, the jury have a reasonable doubt as to the defendant's guilt of manslaughter, arising out of all the evidence, then they should find him not guilty of any offense.[39]

§ 784. **Killing while lying in wait murder.**—Although the jury may believe from the evidence that the deceased and Tennie Hicks were criminally intimate, this would not in law justify or excuse the defendant in lying in wait to shoot and kill

[36] Upstone v. P. 109 Ill. 175. Held not ignoring the defense of insanity. Jackson v. P. 18 Ill. 270. See Dorsey v. S. 110 Ga. 331, 35 S. E. 651.

[37] Cook v. S. (Fla.), 35 So. 669.

[38] Hunt v. S. 135 Ala. 1, 33 So. 329; Compton v. S. 110 Ala. 24, 20 So. 119; Stoneking v. S. 118 Ala. 70, 24 So. 47.

[39] Adams v. S. 133 Ala. 166, 31 So. 852.

the deceased, if you believe from the evidence he did so lie in wait. So, if the jury believe from the evidence that the defendant followed the deceased, and shot him from ambush, feloniously, premeditated, and with his malice aforethought, as the terms are in these instructions defined, then the criminal relation between the deceased and the said Tennie Hicks, if it did exist, and if it were known to the defendant, does not reduce the killing below murder in the second degree, and affords no justification or mitigation for the shooting if done under such circumstances.[41]

§ 785. **Killing by one of several burglars.**—If the jury believe from the evidence that the homicide charged in the indictment was committed by one of several burglars while engaged in secreting or disposing of property which said burglars had previously stolen, and that the killing was done to prevent the discovery and seizure of said property by the person killed, then, unless the jury believe from the evidence, beyond all reasonable doubt, that the defendant was present at the homicide, or sufficiently near to render aid and assistance to the perpetrator, and actually did aid, abet, or encourage the person who committed the homicide, or unless the jury shall find that the defendant, before the homicide, counseled or advised the persons in charge of the said goods to oppose and resist whosoever should attempt to seize said goods, or interrupt them in secreting them or disposing of said goods, and that the killing of the deceased occurred in the course of such resistance as the defendant had so counseled and advised, then they ought to acquit the defendant.[42]

§ 786. **Killing person not intended.**—It is not necessary that, when a purpose to take life is formed, the particular party who is killed shall be present to the mind of the party accused. It is sufficient if the purpose was formed to kill any one coming along who presented the opportunity and inducements to the crime.[43]

§ 787. **Officer killing while arresting.**—If the defendant was a policeman of the town, as he insists he was, the law clothed him with the same authority to make arrests within the town as is vested in the sheriff, and if he could have kept Brooks in custody,

[41] S. v. Hicks (Mo.), 77 S. W. 541.
[42] Lamb v. P. 96 Ill. 73, 81.
[43] S. v. Dickson, 6 Kas. 213.

and prevented the deceased from rescuing him without striking, it was his duty to have done so. Were there bystanders? If so, he had authority to call them to his aid, and if by doing so he could have avoided striking the deceased, he should have done so, and, if he failed to do so, he was not justified in striking the deceased, and it will be your duty to return a verdict of guilty; but if the situation was such that he could not reasonably and conveniently procure assistance, then he had a right to use such force as was necessary under the circumstances to secure Brooks, and if, in the due exercise of that right, he struck the deceased, he was justified.[44]

§ 788. **Killing officer while arresting.**—Constables are peace officers, and it is their right and duty to arrest with or without a warrant any person who has committed any criminal offense in their presence, or who is at the time engaged in or about to commit any breach of the peace; and they have the right, in making such arrest, to use such force as is necessary therefor, and summon to their aid a posse sufficient to accomplish such arrest. A breach of the peace is a public offense, and it may be committed by any loud or boisterous words calculated to disturb the good order of the persons there assembled, or by the drawing or brandishing of deadly weapons, accompanied by threats to attack or kill another then and there present.[45]

§ 789. **Arresting without a warrant, justifiable.**—If the person arrested is, as a matter of fact, in the act of committing such offense at the time of the arrest, and the officer making the arrest has information or knowledge which induces him to reasonably believe, and at the time of the arrest he does believe, that such offense is being committed, and the arrest is made for that reason, it is sufficient to justify the arrest without a warrant.[46]

§ 790. **Degree of proof to warrant conviction.**—To warrant a conviction the state is required to prove, beyond a reasonable doubt, that the defendant feloniously killed the deceased at the

[44] S. v. Bland, 97 N. Car. 441, 2 S. E. 460.

[45] Fleetwood v. Com. 80 Ky. 1. (See this case for a series of instructions relating to the law of homicide in killing an officer while attempting to make an arrest for a breach of the peace.)

[46] Ballard v. S. 43 Ohio St. 340, 1 N. E. 76.

time and place and in the manner and form as alleged in the indictment. It is not sufficient to envelope the death of the deceased in mystery, rendering it incapable of explanation, without inferring the guilt of the defendant. To warrant a conviction the state is required to explain all mystery sufficiently to remove all reasonable doubt and establish facts that are susceptible of explanation upon no reasonable hypothesis consistent with the defendant's innocence, and that point to his guilt beyond any other reasonable solution and beyond all reasonable doubt.[47]

§ 791. **Wound neglected, causing blood poisoning.**—If the jury believe from the evidence, beyond a reasonable doubt, that the defendant cut the deceased in the arm with a knife or other instrument capable of inflicting a similar wound, as charged in the indictment, it is no excuse to say that the deceased would not have died if he had taken proper care of himself, or that neglect, or the want of proper applications to the wound had brought on blood-poisoning, and of that he died, provided you believe from the evidence, beyond a reasonable doubt, that the wound was the primary or principal cause of his death.[48]

§ 792. **Mere presence of accused is not aiding.**—(1) In the absence of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may have become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act; and so in this case, if you find the defendant on trial, although present at the time of the shooting, knew nothing of his son H having a revolver or intending to shoot, and took no part in the killing, and did no overt act to produce that result, then he is in no way responsible, and must be acquitted, unless you find from the evidence, beyond a reasonable doubt, the shot was fired by H in pursuance of a conspiracy previously formed by them.[49]

(2) The mere presence of the defendant at the time and during

[47] Hinshaw v. S. 147 Ind. 386, 47 N. E. 157.

[48] Duncan v. P. 134 Ill. 119, 24 N. E. 765.

[49] Woolweaver v. S. 50 Ohio St. 287, 34 N. E. 352. See Worden v. S. 24 Ohio St. 143.

the act of killing would not of itself be sufficient to constitute him an aider and abetter in the commission of the act charged; but it is not essential, in order to constitute him such aider and abetter. that he should himself have fired the fatal shot. It is sufficient if, at the time of the killing, he was present, consenting to and encouraging the act, and ready, if need be, to give assistance to the one who did the killing.[50]

(3) It is not sufficient to establish the guilt of the defendant of aiding and abetting H in the commission of the homicide charged in the indictment that he was present on the scene with the others where the alleged killing was done, for he may have been present not knowing that any crime was about to be committed; and if he was not there in furtherance of an understanding or common purpose to commit some unlawful act, and was in company with H without knowledge that H or any of his co-defendants contemplated the commission of an offense, he is not responsible for the acts of H or his co-defendants, if he, the defendant, did not actually participate in the commission of the crime charged.[51]

(4) If you find from the evidence that H named as principal in the indictment, took the life of the deceased, but did it in a sudden quarrel or in the heat of passion, his offense would be manslaughter; and if you further find from the evidence that the defendant did no overt act, and took no part in the killing, but was merely present when the quarrel arose or fight began, you cannot in such case find him guilty as an aider and abetter of the said H.[52]

§ 793. Inquest proceedings not evidence.—The court further instructs you that what any witness or witnesses may have testified to before the grand jury, or at the coroner's inquest, is no evidence of the guilt of the defendant.[53]

§ 794. Manslaughter defined, and illustrative cases.—(1) Manslaughter is the unlawful killing of a human being without malice, expressed or implied, either voluntarily, upon a sudden heat

[50] Kelly v. S. (Fla.) 33 So. 235.

[51] Goins v. S. 46 Ohio St. 467, 21 N. E. 476.

[52] Goins v. S. 46 Ohio St. 471, 21 N. E. 476.

[53] Ritter v. P. 130 Ill. 255, 260, 22 N. E. 605; Purdy v. P. 140 Ill. 46, 52, 29 N. E. 700.

or involuntarily, but in the commission of some unlawful act. And if you find from the evidence, beyond a reasonable doubt, that the defendant did the killing unlawfully and voluntarily, but in a sudden heat or transport of passion, or involuntarily, in the commission of an unlawful act, and without malice, express or implied, then the offense would be manslaughter, and you should so find him guilty.[54]

(2) In general, where an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasions it. If it be in the prosecution of a felonious intent, or in consequence of an act naturally tending to bloodshed, it will be murder. But, if no more is intended than a mere civil trespass, it will be manslaughter.[55]

(3) If you are convinced beyond a reasonable doubt by the evidence that the defendant unlawfully committed an assault and battery upon the person of C on the sixteenth day of August, 1884, without any intention or purpose to kill him, the said C, but thereby inflicted a wound upon his person by reason of which the said C died on the twenty-fourth of August, 1884, then the defendant is guilty of involuntary manslaughter. Assault and battery, as used in this instruction, means any unlawful touching, striking, biting, beating, or wounding of another in a rude, insolent and angry manner.[56]

[54] Powers v. S. 87 Ind. 154.
[55] S. v. Shelledy, 8 Iowa, 495.
[56] S. v. Johnson, 102 Ind. 247, 1 N. E. 377.

CHAPTER LVII.

HOMICIDE—SELF-DEFENSE.

Sec.
795. Justifiable homicide defined—Illustrations.
796. Cases illustrating self-defense.
797. Defendant at fault in provoking difficulty.
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799. Bare fear no justification.
800. Mere belief of danger no defense.
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802. Danger need not be real.
803. Reasonable doubt of apprehension.
804. Resisting attack of several persons.
805. Resisting unlawful arrest.
806. Accidental killing no offense.
807. Character of deceased proper matter.

§ **795. Justifiable homicide defined—Illustrations.**—(1) Justifiable homicide is the killing of a human being in necessary self-defense, or in the defense of habitation, person or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony. A bare fear of the offense to prevent which the homicide is alleged to have been committed shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under their influence, and not in a spirit of revenge.[1]

(2) A person may repel force by force in defense of his person, habitation or property against one who manifestly intends or endeavors by violence or surprise to commit a known felony

[1] Blair v. S. 69 Ark. 558, 64 S. W. 948. The objection that this instruction sets up an ideal person was raised but not decided by the court.

on either; and if a conflict ensue in such case, and life is taken, the killing is justifiable. It must be proved that the assault was eminently perilous, and unless there is a plain manifestation of a felonious intent, no assault will justify the killing of the assailant. A person is not compelled to flee from his adversary who assails him with a deadly weapon; but before he can justify the homicide, the assault must be so fierce as not to allow the person assailed to yield without manifest danger to his life or of receiving enormous bodily injury. In such case, if there be no other way of saving his own life, or of preventing enormous bodily injury, he may, in self-defense, kill his assailant.[2]

(3) If the jury believe from the evidence that, just prior to his death, the deceased attempted, in a violent manner, to enter the dwelling of the defendant for the purpose of assaulting or offering personal violence to the defendant, being in said dwelling or any other person dwelling or being therein, and that the defendant, in reasonably resisting such attempt of the deceased, unintentionally and without malice killed the deceased, then the killing was justifiable or excusable, and the jury ought to acquit the defendant. The jury, in considering whether the killing was in defense of habitation, should consider the circumstances attending the killing and the conduct of the parties at the time, and immediately previous thereto, and the means and force used as bearing upon the question of whether the killing was in defense of habitation.[3]

§ **796. Cases illustrating self-defense.**—(1) If the defendant went to the house of L for the purpose of ministering to his wants as an invalid, and having no ill will or quarrel with B, and said B requested the defendant to go out of the house with him, and they went out together at B's request, and when outside, B threatened to assault and beat the defendant, and without cause did assault and strike the defendant violently and in anger, and if the defendant at the time believed and had reason to believe that said B was about to and would do him great bodily harm, then the defendant had a right to

[2] S. v. Kennedy, 20 Iowa, 571. [3] Greschia v. P. 53 Ill. 299.

defend himself with his pocket knife if necessary; and if in the reasonable defense of his own person the defendant inflicted wounds upon the said B, of which he died, then the defendant is not guilty, and he should be acquitted upon the ground of self-defense.[4]

(2) If the jury believe from the evidence that the defendant, Reins, in defense of himself, inflicted upon the deceased the wounds or stabs which caused his death, while the deceased was manifestly intending and endeavoring in a violent manner to enter the habitation of the witness, Mrs. Foley, for the purpose of assaulting or offering personal violence to the defendant, Reins, being therein, the killing was justifiable, and the jury must acquit the defendant.[5]

(3) If the jury believe from the evidence that the deceased first assaulted the defendant without any reasonable or justifiable cause, and that at the door of Mrs. Foley's shanty the defendant tried and endeavored, in good faith, to escape from the deceased and prevent his entry therein and did not seek to renew the fight, and that the defendant was in fear of his life, or of great bodily harm from the deceased, and that from all the surrounding circumstances he had reasonable grounds for such fears, they should acquit the defendant.[6]

(4) If the jury believe that G and the deceased, acting in concert and with the intention of inflicting great bodily harm upon the defendant, attacked him with clubs, then the defendant had the right to resist such attack with a weapon of like character, and if, in the necessary defense of his own person and without using any more force or a more dangerous weapon than the one used against him, if any, he inflicted a blow which he had reason to believe, and in good faith did believe, was necessary for his own protection, but which, unintentionally upon his part, produced the death of his assailant, such act would not be criminal, and the jury should acquit the defendant.[7]

§ 797. **Defendant at fault in provoking difficulty.**—(1) The defendant cannot avail himself of the doctrine of necessary self-

[4] Fields v. S. 134 Ind. 55, 32 N. E. 780. See Trogdon v. S. 133 Ind. 7, 32 N. E. 725.

[5] Reins v. P. 30 Ill. 256, 262.

[6] Reins v. P. 30 Ill. 257, 263

[7] S. v. Burke, 30 Iowa, 333.

defense, if the necessity of that defense was brought on by himself, or provoked by his own deliberate and lawless acts, or by beginning the fight with the deceased for the purpose of taking his life or committing a bodily harm upon him in which he killed the deceased by the use of a deadly weapon, unless the defendant had really, and in good faith, endeavored to decline any further struggle before the shot was fired.[8]

(2) If you shall believe and find from the evidence that the defendant sought, brought on or voluntarily entered into a difficulty with the deceased for the purpose of wreaking vengeance upon him, or if you shall find and believe that he wounded the deceased at a time when he had, because of the acts of the deceased, no reasonable apprehension of immediate and impending injury to himself, and did so from a spirit of retaliation and revenge for the purpose of punishing the deceased for past injuries done him, the defendant, then the defendant cannot avail himself of the law of self-defense, and you should not acquit him on that ground—no matter how great the danger or imminent the peril to which the defendant may have believed himself to have been exposed during such difficulty.[9]

(3) The law of self-defense does not imply the right to attack. If you believe from the evidence that the defendant armed himself with a deadly weapon, and sought the deceased with the felonious intent of killing him, and sought or brought on, or voluntarily entered into a difficulty with the deceased with the felonious intention to kill him, then the defendant cannot invoke the law of self-defense, no matter how imminent the peril in which he found himself placed.[10]

(4) The right of self-defense is allowed to the citizen as a shield, and not as a sword, and in the exercise of this right a person must act honestly and in good faith. A person when assaulted may exercise a reasonable degree of force to repel an attack, but must not provoke an attack in order that he may have an apparent excuse for killing his adversary.[11]

[8] Bett v. P. 97 Ill. 461, 473. Held not assuming facts and not objectionable in not referring to the evidence.

[9] S. v. Vansant, 80 Mo. 69.

[10] S. v. Hicks (Mo.), 77 S. W. 540.

[11] Harmon v. S. 158 Ind. 43, 62 N. E. 630.

§ 798. **Declining further struggle.**—(1) Before the defendant can avail himself of the right of self-defense it must appear that at the time of the killing the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the deceased was absolutely necessary, or apparently necessary; and it must also appear that the deceased was the first assailant, or that the defendant had in good faith endeavored to decline any further struggle before the mortal shot was fired.[12]

(2) Before the defendant can claim that he was acting in self-defense it must appear that he really, and in good faith, endeavored to decline any further struggle before the homicide was committed. And in this case, if you believe from the evidence that the defendant was engaged in mortal combat with D, the deceased, and that the defendant did not really and in good faith endeavor to decline any further struggle before the homicide was committed, if one was committed, then and in such case the defendant cannot avail himself of the plea of self-defense.[13]

§ 799. **Bare fear no justification.**—The bare fear that a man intends to commit murder or other atrocious felony, however well grounded, unaccompanied by any overt act indicative of any such intention, will not warrant killing the person by way of prevention. There must be some overt act indicative of imminent danger at the time, but the jury will judge whether the conduct and acts of the deceased, B, at the time of the shooting were of such a character as to create in the mind of the accused a reasonable fear that the deceased intended to commit murder or other felony, or to do the accused great bodily harm. Apprehension of danger, to justify a homicide, ought not to be based on surmises alone, but there ought to be coupled therewith some act or demonstration on the part of the person from whom danger is or was apprehended, evincing an immediate intention to carry into execution his threats or designs; and the jury are to judge of the reasonable grounds for such apprehension on the part of the accused from all the

[12] Henry v. P. 198 Ill. 162, 65 N. E. 120.

[13] P. v. Robertson, 67 Cal. 649, 8 Pac. 600.

facts and circumstances as they existed at the time of the killing.[14]

§ 800. **Mere belief of danger no defense.**—It is not enough that the party killing another believe himself in danger from the person killed, unless the facts were such that the jury, in the light of all the facts and circumstances known to the slayer, or believed by him to be true, can say he had reasonable ground for such belief.[15]

§ 801. **Mere previous threats.**—Previous threats or acts of hostility of the deceased towards the defendant, however violent they may have been, were not of themselves sufficient to justify the defendant in seeking and slaying the deceased. To excuse him or justify him, he must have acted under an honest belief that it was necessary at the time to take the life of the deceased in order to save his own, and it must appear that there was reasonable cause to excite this apprehension on his part; so that if you find that the deceased at the time he was killed did nothing to excite in the mind of the defendant the fear that the deceased was about to execute his threats, then the threats and bad character of the deceased, whatever you may find them to have been, are unavailing, and should not be considered by you. But if the evidence leaves you in doubt as to what the acts of the deceased were at the time, or immediately after the killing, you may consider the threats and character of the deceased, in connection with all the other evidence, in determining who was probably the aggressor. The jury are instructed that mere threats made by the deceased before or at the time of the killing, unaccompanied at the time of the killing with any attempt to carry them into execution, are not sufficient to justify the killing or to reduce it to a lower degree of homicide than murder; and if you find that the defendant shot and killed the deceased because of such threats, and because the defendant thought such threats would justify him in killing the deceased, and that when he shot and killed him he was in no fear of imminent danger, he is guilty of

[14] S. v. Cain, 20 W. Va. 710.

[15] Todd v. S. (Tex. Cr. App.), 44 S. W. 1096.

murder. And if the killing was the result of a deliberate purpose fixed in his mind to kill, it was murder in the first degree.[16]

§ 802. Danger need not be real, appearance sufficient.—(1) It is not always that the danger should be real in order that a person may justify on the ground of self-defense, but if the defendant, acting as a reasonable man, had reason to believe, and did believe, that his life was in danger, or that he was in danger of receiving great bodily harm at the hands of the deceased, and, acting upon such belief, took the life of the deceased, such act would be justifiable, although it might afterwards appear that there was in fact no real danger.[17]

(2) The important questions for the jury to determine are: first, was the defendant, at the time he fired the fatal shot, in present danger of death or serious bodily harm, or were the circumstances such as to afford him reasonable grounds for believing himself to be in such danger? second, was the shooting done in good faith to protect himself from such danger or threatened danger? If both of these questions can be answered in the affirmative the shooting would be justifiable. The defendant, under the law, would have the right to defend himself from the appearances of danger the same and to the same extent as he would were the danger real. That the danger appeared real to the defendant is all the law requires to justify him in acting; and in passing upon the question as to the defendant's right to act, the matter must be viewed from the standpoint of the defendant.[18]

(3) The law is, that if a person is assaulted in such a way as to produce in the mind of a reasonable person a belief that he is in actual danger of losing his life, or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not be held responsible criminally if he acts in self-defense from real and honest convictions as to the character of the danger, induced by reasonable evidence, although he may be mistaken as to the extent of the actual danger.[19]

[16] Mize v. S. 36 Ark. 662.
[17] S. v. Miller (Ore.), 77 Pac. 660.
[18] Francis v. S. (Tex. Cr. App.), 70 S. W. 75.
[19] Crews v. P. 120 Ill. 317, 11 N. E. 404.

(4) The law is, if a person is assaulted in such a way as to produce in the mind of a reasonable person a belief, and if he does honestly believe, that he is in actual danger of losing his life or of suffering great bodily harm, he will be justified in defending himself, although the danger be not real, but only apparent. Such a person will not he held responsible criminally if he acts in self-defense, from real and honest convictions, as to the character of the danger, induced by reasonable evidence, although he may have been mistaken as to the extent of the actual danger.[20]

(5) If you believe from the evidence in this case that the defendants, or either of them, was assaulted by the deceased in such a way as to induce in such defendant a reasonable and well-founded belief that he was actually in danger of losing his life or of suffering great bodily harm, then he was justified in defending himself, whether the danger was real or only apparent. Actual or positive danger is not indispensable to justify self-defense. The law considers that men, when threatened with danger, are obliged to judge from appearances, and determine therefrom as to the actual state of things surrounding them; and in such case, if persons act from honest convictions, induced by reasonable evidence, they will not be held responsible criminally for a mistake as to the extent of the actual danger.[21]

(6) One who is without fault and in a place where he has a right to be and is then unlawfully assaulted, he may, without retreating, repel force with force, and may go even to the extent of taking the life of his assailant, if in repelling him he uses no more force than is reasonably necessary in his own self-defense.[22]

(7) If a person assaulted, being himself without fault, reasonably apprehends death or great bodily harm, unless he kills his assailant, the killing is excusable; and if you believe that the defendant was assaulted by the deceased in such a manner as to cause him to believe, and he did believe, that he was in

[20] McDonnall v. P. 168 Ill. 93, 48 N. E. 86.

[21] McDonnall v. P. 168 Ill. 93. 48 N. E. 86.

[22] Page v. S. 141 Ind. 237, 40 N. E. 745. See Fields v. S. 134 Ind. 55, 32 N. E. 780; Trogdon v. S. 133 Ind. 7, 32 N. E. 725; S. v. Kennedy, 20 Iowa, 571.

imminent danger of losing his life or suffering great bodily harm at the hands of the deceased unless he kills him, and while so believing he killed the deceased, he is entitled to an acquittal.[23]

(8) The necessity which in law permits the taking of life in self-defense may be either apparent or real. It is real when there is actual danger to life or of great bodily harm; it is apparent when the circumstances, at the time of the taking of life, indicate to a reasonable mind the presence of actual danger to life or great bodily harm, though in fact there is no danger.[24]

(9) Every person has the right to defend himself against attacks, or threatened attacks, of such a character as would endanger his life or limb, or do him serious bodily harm or injury, even to the taking of the life of the assailant; and where a person apprehends that another is about to do him great bodily harm, and has reasonable grounds for believing the danger to be imminent, he may safely act upon such apprehension and even kill the assailant, if that be necessary to avoid the apprehended danger.[25]

(10) In order to justify homicide on the ground of self-defense, or defense of another, it is not essential that there should be any actual or real danger to the life or person of the party killing or to the life or person of the party for whose protection the homicide is committed, if there be an appearance of danger, caused by the acts or demonstrations of the person killed, or by words coupled with the acts or demonstrations of such person; and if such acts or demonstrations or such words, coupled with acts or demonstrations, produce in the mind of the person slaying a reasonable expectation or fear of death or some serious bodily injury to himself or to the person in whose behalf he interferes, the person killing will be justified if he in good faith acts on such appearance of danger and under such reasonable expectation or fear, even though it subsequently appear that there was in reality no danger.[26]

§ 803. Reasonable doubt of defendant's apprehension.—If

[23] Deilks v. S. 141 Ind. 25; 40 N. E. 120.
[24] Marts v. S. 20 Ohio St. 162.
[25] Marts v. S. 20 Ohio St. 162.
[26] Kemp v. S. 13 Tex. 565.

the jury believe from the evidence in the case that there is a reasonable doubt as to whether the prisoner at the time of the shooting was under reasonable apprehension that the prosecuting witness intended to inflict upon him great bodily harm, and that he fired the shots in self-defense, then the jury must acquit.[27]

§ 804. **Resisting attack of several persons.**—(1) If the defendant and his co-defendants were in the exercise of their lawful rights in passing along the streets at the time of the conflict in which H was killed, and neither of the accused parties began the affray or attack, then the defendant and those accused with him had the right to repel the assault with such force as was necessary to do so, and had the right to defend themselves from danger to life or great bodily harm; and if they were suddenly assailed or surrounded by superior numbers of persons armed with weapons dangerous to life or calculated to do great bodily harm, the defendants had a right to stand on their defense, to repel force by force, even to the taking of life, if they believed, and had reasonable grounds to believe, that it was necessary to do so to prevent either death or great bodily harm to themselves, and if necessary, they may use such weapons as will accomplish the purpose.[28]

(2) If the only purpose made known to the defendant prior to the killing of H, and the only one contemplated or entered upon by him was the defense of himself and companions from an attack by a number of men superior in numbers and strength which had been threatened, and neither the defendant nor his companions were to be the aggressors, or attack the opposing parties, then such common purpose of defense merely was not unlawful or criminal.[29]

§ 805. **Resisting unlawful arrest.**—If an officer or other person who attempts to prevent another from committing a felony, uses more force than is reasonably necessary, he becomes a wrong-doer, and the person sought to be prevented may resist such excess of force by force, even to the killing of the wrong-doer.

[27] Lawler v. P. 74 Ill. 230.
[28] Goins v. S. 46 Ohio St. 469, 21 N. E. 476.
[29] Goins v. S. 46 Ohio St. 468, 21 N. E. 476.

if necessary, to preserve his own life from such excessive use of force, to save himself from great bodily harm.[30]

§ 806. Accidental killing no offense.—If you find from the evidence that the deceased and defendant were riding the same horse along the road mentioned, the defendant having a pistol in his hand, and that the deceased seized hold of the pistol in the hand of the defendant and attempted to take the pistol from the defendant by force, and in the scuffle which ensued the pistol was accidentally discharged and produced the death of the deceased by accident, and without the fault or culpable negligence of the defendant, and without the defendant commencing or bringing on the difficulty with the deceased, you will find the defendant not guilty.[31]

§ 807. Character of deceased proper matter.—The character of the deceased is a proper matter for your consideration, and you should give it such weight as you deem proper, under the evidence, in determining whether or not he, by his acts at the time of the wounding, gave the defendant reasonable cause to apprehend such danger as to justify his acts of wounding on the ground of self-defense, according to the law upon that subject as stated in these instructions. The mere fact, however, that the deceased was a man of bad character, if you believe from the evidence he was of such character, will not justify the taking of his life.[32]

[30] Bossit v. S. 53 Ind. 417. See also Plummer v. S. 135 Ind. 308, 34 N. E. 568.

[31] S. v. Wisdom, 84 Mo. 190. See also Potter v. S. 162 Ind. 213, 70 N. E. 129.

[32] S. v. Vansant, 80 Mo. 70.

CHAPTER LVIII.

BURGLARY AND LARCENY.

Sec.
808. Breaking defined.
809. Intent, how shown.
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812. Possession of property taken by burglary.
813. Submitting facts to the jury.
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815. Intent an essential element.
816. Possession of stolen property, evidence.
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818. Taking under claim of right.
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Burglary.

§ 808. **Breaking defined.**—(1) The opening of a closed door with the intent expressed in the statute, as by lifting a latch, turning a key in a lock, pushing open a closed door, or by pushing open a window, or in any other way using any force to enter, is sufficient to constitute a breaking, and it is not necessary to show in evidence that any lock or other fastening was broken by violence.[1]

(2) The breaking of the window by pulling off the plank and undoing the fastening is a forcible bursting and breaking within the meaning of the statute.[2]

(3) If you are satisfied from the evidence beyond a reasonable doubt as to all the other elements necessary to constitute a burglary, except a breaking, and find that the transom was closed

[1] S. v. Reed, 20 Iowa, 421. See S. v. O'Brien, 81 Iowa, 95, 46 N. W. 861.

[2] S. v. Butterfield, 75 Mo. 301.

on the night in question, though not fastened, and that the defendant used sufficient force to push it from its place, so that it would swing open, that would be a sufficient breaking in law, and, under the circumstances, if you are satisfied beyond a reasonable doubt, your verdict should be guilty.[3]

§ 809. **Intent, how shown.**—(1) If you find that in the night time the defendant broke and entered the dwelling house described in the indictment, this fact would be strong presumptive evidence that the defendant did such breaking and made such entry with the intent to commit a public offense. But such presumption may be overcome by evidence.[4]

(2) The intent with which an act is committed being but a mental state of the accused, direct proof of it is not required. Nor indeed can it ordinarily be so shown; but it is generally established by all the facts and circumstances attending the doing of the act complained of as disclosed by the evidence; and in this case the intent with which the defendant entered the dwelling house of G, if he did enter it, must be determined by you from all the evidence in the case.[5]

§ 810. **Burglary and larceny at same time, verdict.**—(1) While the offense of burglary and larceny are charged in the same counts of the information, yet they are each separate and distinct offenses, and the jury are at liberty to acquit as to one and find the defendants guilty of the other, or find the defendants guilty of both, or acquit of both offenses, as they may believe from all the facts and circumstances in evidence; but to find the defendants guilty of either offense they must so find from all the facts and circumstances in evidence beyond a reasonable doubt. And in this connection the court further instructs you that you may find either one of the defendants guilty and acquit the other of either or both offenses, as you may believe the evidence warrants.[6]

(2) If the jury find the defendants guilty of burglary, and if the jury further believe that at the time of the commission of said

[3] Timmons v. S. 34 Ohio St. 426.
[4] S. v. Fox, 80 Iowa, 312, 45 N. W. 874.
[5] S. v. Maxwell 42 Iowa, 210. See also Bloch v. S. 161 Ind. 276, 68 N. E. 287.
[6] S. v. Peebles (Mo.), 77 S. W. 520.

burglary the defendant did take, steal and carry away from the premises aforesaid any flour owned by Hall, you should find the defendants guilty of larceny, and fix their punishment at imprisonment in the penitentiary for a term not less than two years nor more than five years in addition to the punishment assessed for the burglary.[7]

§ 811. **Aiding and abetting, acting together.**—Where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that both of the defendants, or either one of them, when tried alone, actually broke and entered the building or took the property. It is sufficient if it be shown that the joint defendants were acting together for that purpose, and if either one of them, while so acting together for that purpose, actually broke and entered the building with the intention of stealing therein, then all of the said defendants would be guilty of the crime, and either one of them may be prosecuted alone therefor.[8]

§ 812. **Possession of property taken by burglary.**—(1) To justify a conviction of burglary in this case there must be other evidence than the mere unexplained possession of property recently stolen by burglary. Evidence that the defendant was in and about the store in question on the evening preceding the burglary thereof, is not sufficient to justify a conviction, even when considered with the unexplained possession of goods recently obtained from the store by burglary.[9]

(2) If you believe from the evidence before you beyond a reasonable doubt that the property introduced in evidence or some portion thereof was stolen from the dwelling house in question by breaking and entering the same in the night time, with the intent to steal said property, and if you further believe from the evidence that recently thereafter the property thus stolen, if any, was found in the possession of the defendant, then in such case you would be warranted in concluding that he, the defendant, stole the property thus found in his possession, if any, by breaking and entering the said dwelling-house in the night time with intent to steal the same, unless the facts and

[7] S. v. Peebles (Mo.), 77 S. W. 520.

[8] S. v. Tucker, 36 Or. 291, 51 L. R. A. 246, 252. N. W. 290.

[9] S. v. Tilton, 63 Iowa, 117. See Potterfield v. Com. 91 Va. 801, 805, 22 S. E. 352.

circumstances shown by the evidence raise in your minds a reasonable doubt as to whether he did come honestly into possession of the same. But if the facts and circumstances in evidence do not raise such reasonable doubt, then you would not be warranted in drawing such conclusion from such possession alone, even if established by the evidence.[10]

§ 813. **Submitting facts to the jury.**—(1) If the jury believe from the evidence that the defendants on or about the twenty-eighth day of March, 1881, at the county of Saline, broke and entered the dwelling house of W by forcibly breaking and bursting the window, in which there was at the time a human being, with the intent of stealing and carrying away any goods, wares, merchandise or other property then being in said dwelling house, then they will find the defendants guilty of burglary in the first degree and assess their punishment at imprisonment in the state penitentiary for a term of years not less than ten.[13]

(2) If in this case the jury are satisfied from the evidence beyond a reasonable doubt that the defendant committed the burglary as charged, still if the jury believe from the evidence beyond a reasonable doubt that the defendant did steal the goods described in the information, then the jury may find the defendant guilty of larceny.[14]

Larceny.

§ 814. **Definition and essential elements.**—Larceny is the felonious, stealing, taking, carrying, riding or driving away of the personal property of another.[15]

If the defendant had actually taken the money into his hands and lifted it from the place where the owner had put it so as to entirely remove it from the place where it was put, with the intention of stealing it, he would be guilty of larceny, though he may have dropped it into the place it was laying, upon being discovered, and had not taken it out of the money drawer.[16]

[10] S. v. Frahm, 73 Iowa, 355; S. v. Rivers, 68 Iowa, 616; S. v. Yohe, 87 Iowa, 35.

[13] S. v. Butterfield, 75 Mo. 301 (held proper under the statute of Missouri).

[14] Ferguson v. S. (Neb.), 77 N. W. 590. Held not assuming burglary was committed.

[15] Bennett v. S. 70 Ark. 43, 66 S. W. 199; Hughes' Cr. Law, § 375, citing: 4 Bl. Com. 229; 2 East P. C. 553; 1 Hale P. C. 503; Johnson v. P. 113 Ill. 99.

[16] Eckels v. S. 20 Ohio St. 515.

§ 815. **Intent an essential element.**—(1) The mere unlawful taking and carrying away of the personal property of another is not larceny. The taking of the property alleged to have been stolen must have been accompanied with a felonious intent to steal the same, and such intent must have existed at the time of the taking of the property.[17]

(2) Not every unlawful taking and carrying away of the personal property of another will amount to larceny; the felonious intention to steal the property must accompany the act of the original taking.[18]

(3) Although you may find from the evidence that the defendant may have taken the horse in question, you cannot find him guilty unless you further find from the evidence beyond a reasonable doubt that the taking was with the felonious intent to steal, and that the horse was then the property of S.[19]

(4) Before you can find the defendant guilty, you must believe from the evidence beyond a reasonable doubt that at some time within three years from the finding of the indictment in the case, he, the defendant, took possession of said horse with the intent to steal, take or carry it away, and that said horse was then the property of S.[20]

(5) If the jury believe from the evidence that the horse in question was running at large and regarded as an estray in the neighborhood. and they further find from the evidence beyond a reasonable doubt that the defendant took possession of said horse, or exercised such ownership over him as owners of live stock usually exercise over the same, with intent to steal said horse, they will find the defendant guilty.[21]

§ 816. **Possession of stolen property evidence of guilt.**—(1) The court instructs the jury that the possession of stolen property soon after the commission of the theft is prima facie evidence that the person in whose possession it is found is guilty of the wrong-

[17] Williams v. S. 44 Ala. 396; Fulton v. S. 13 Ark. 168; Keely v. S. 14 Ind. 36; Smith v. Schultz 1 Scam. (Ill.) 490.

[18] Hughes' Cr. L. § 380, citing: S. v. Wood, 46 Iowa, 116; P. v. Moore, 37 Hun (N. Y.), 84; Weaver v. S. 77 Ala. 26; Levy v. S. 79 Ala. 259; S. v. Cummings, 33 Conn. 260; S. v. Woodruff, 47 Kas. 151, 27 Pac. 842.

[19] Bennett v. S. 70 Ark. 43, 66 S. W. 199.

[20] Bennett v. S. 70 Ark. 43, 66 S. W. 199.

[21] Bennett v. S. 70 Ark. 43, 66 S. W. 199. See Starch v. S. 63 Ind. 283.

ful taking, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt.[22]

(2) If the evidence in this case shows that the property described in the indictment was feloniously stolen, taken and carried away on ——, and if it further shows that on the next day it was found in the possession of the defendant, and that he claimed it to be his own and sold it or a part of it; and if the evidence shows that the defendant has failed to honestly account for his possession of the same, such failure is a circumstance tending to establish his guilt, and from which you may find him guilty if the allegations of the indictment have been proven beyond a reasonable doubt.[23]

(3) If the jury believe from the evidence that the property mentioned in the information, or any part thereof, was feloniously taken from the person of the prosecuting witness, Carter, as described in the information, and received into the possession of the defendant shortly after being so feloniousy taken, the failure, if failure there be, of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and the accused is bound to explain the possession in order to remove the effect of the possession as a circumstance to be considered in connection with other suspicious facts, if the evidence discloses any such.[24]

(4) The exclusive possession of property recently stolen unaccompanied by a reasonable account of how the possession was acquired creates a presumption that the person found in possession of the same is the thief.[25]

(5) The defendant is not required to satisfactorily explain his possession of recently stolen property. If after considering all

[22] Smith v. P. 103 Ill. 82, 85. (This instruction does not assume the existence of any fact); Keating v. P. 160 Ill. 483, 43 N. E. 724; Gunther v. P. 139 Ill. 526, 28 N. E. 1101; Gablick v. P. 40 Mich. 292, 3 Am. Cr. R. 244; S. v. Kelley, 57 Iowa, 644, 11 N. W. 635; S. v. Brady (Iowa), 97 N. W. 64; Brooks v. S. 96 Ga. 353, 23 S. E. 413. Contra: White v. S. 21 Tex. App. 339, 17 S. W. 727; P. v. Chadwick, 7 Utan, 134, 25 Pac. 737; Harper v. S. 71 Miss. 202, 13 So. 882; Calloway v. S. 111 Ga. 832, 36 S. E. 63.

[23] Jones v. S. 53 Ind. 237. See Campbell v. S. 150 Ind. 75, 49 N. E. 905.

[24] P. v. Wilson, 135 Cal. 331, 67 Pac. 322.

[25] Potterfield v. Com. 91 Va. 801, 805, 22 S. E. 352.

the evidence introduced by him in connection with all the other evidence in the case, there appears a reasonable doubt of his guilt as charged in the indictment, then he should be acquitted.[26]

§ 817. Property found and appropriated by defendant.—(1) If you believe from the evidence that the defendant found the trunk in the road, you are bound to find him not guilty, although you may believe that he afterwards broke it open and disposed of its contents to his own use.[27]

(2) If you find from the evidence that said goods had been lost and were found by the defendant; that at the time he found the same he did not know who owned them; that there were no marks upon or about the goods showing to whom they belonged so that the defendant could identify the owner at once, even though he could afterwards have discovered the owner by honest diligence, then you must acquit the defendant.[28]

(3) Though the money was actually lost and the defendant found it and at the time of finding supposed it to be lost, and appropriated it with intent to take entire dominion over it, yet really believing that the owner could not be found, that was not larceny and in such case he cannot be convicted. The intent to steal must have existed at the time of the taking. It is not enough that he had the general means of discovering the owner by honest diligence. He was not bound to inquire on the streets or at the printing offices for the owner, though if, at the time of the taking, he knew he had reasonable means of ascertaining that fact, that might be taken as showing a belief that the owner of the money could be found. In order to convict it must be shown that the taking of the money was with felonious intent, that is, with intent to steal under the definition given; and it is not sufficient that after finding the money it was converted to his own use with felonious intent. The intent must have existed at the time of the finding.[29]

§ 818. Taking property under claim of right.—If, from the

[26] Hughes Cr. Law, § 873, citing: Hoge v. P. 117 Ill. 44, 6 N. E. 796; S. v. Kirkpatrick, 72 Iowa, 500, 34 N. W 301, 7 Am. Cr. R. 334; Smith v. S. 58 Ind. 340, 2 Am. Cr. R. 375; Van Straaten v. P. 26 Colo. 184, 56 Pac. 905; S. v. Miller, 107 Iowa, 656, 78 N. W. 679; Grentzinger v. S. 31 Neb. 460, 48 N. W. 148; Heed v. S. 25 Wis. 421; S. v. Merrick, 19 Me. 398.

[27] Lane v. P. 10 Ill. 307.

[28] S. v. Dean, 49 Iowa, 74; Bailey v. S. 52 Ind. 466.

[29] Brooks v. S. 35 Ohio St. 48.

evidence, you find that the defendant had any fair color or right to take the cattle alleged to have been taken by him at the time they were so taken by him, and you find that he took the same under that claim of right, or if you find that he believed they were his cattle, or he had a right to take them, or if you have a reasonable doubt that he so believed, then you will acquit.[30]

§ 819. **Prosecution confined to property alleged.**—If you find from the evidence that any of the hogs alleged to have been stolen do not answer the description given in the information, then, and in that case, if you find the defendant guilty, you will ascertain from the evidence the value of the hogs only that do answer the description in the information in fixing the degree of the crime.[31]

[30] Reese v. S. (Tex. Cr. App.), 68 S. W. 283.

[31] S. v. Montgomery (S. Dak.), 97 N. W. 717.

CHAPTER LIX.

EMBEZZLEMENT AND FALSE PRETENSE.

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Embezzlement.

§ 820. Embezzlement defined—Elements.—(1) Embezzlement is the fraudulent appropriation or conversion to one's own use of the personal property of another delivered to him as agent, servant, employé, bailee, trustee, or in some other fiduciary capacity, with the intent to cheat and defraud the owner.[1]

(2) If you believe from the evidence that the defendant received from C the organ in question, under an agreement that he should act as the agent of the said C in the sale of said organ, and that the defendant should sell the said organ and pay over and deliver to the said C a certain sum of money or notes which the defendant should secure from the sale of said organ, and you further believe that the defendant sold said organ as his own property, and not as the agent for said C, and that at the time of said sale the defendant had the fraudulent intent to appropriate the pro-

[1] Hughes Cr. L. § 492; Underhill Cr. Ev. § 282.

ceeds of said sale to his own use, and that in pursuance of said intent the defendant afterwards appropriated the proceeds of said sale to his own use and benefit without the consent of said C, the defendant would, under such circumstances, be guilty of embezzling said organ.[2]

§ 821. **Agent collecting on commission.**—If the jury believe from the evidence that the defendant, at the time of the alleged embezzlement, was a collector for the company in question, with the right to retain her commissions, that is, that she was not required to pay to the company the gross sum or sums of money collected by her, but might first deduct her commissions and then pay over the balance or net amount to the company, she was not such an agent as is contemplated in the statute defining embezzlement, and the verdict should be not guilty.[3]

§ 822. **Attorney receiving and appropriating money.**—Where an attorney receives money by collecting it from a client, he cannot be held for embezzlement or convicted thereof, unless a demand has first been made upon him for the money by the person authorized to receive it. But where money or drafts or certificates of deposit are placed in the hands of an attorney or agent to be by him forwarded or paid to another person, and he receives the drafts, money or certificates for such purpose, and unlawfully and fraudulently secretes, appropriates, purloins and converts the same to his own use, then, in that case, he would be guilty of embezzlement whether any demand was made or not.[4]

§ 823. **Debtor and creditor, their relation.**—The facts that the relation of debtor and creditor exists between a principal and his agent, and that on balancing the account the agent would be found indebted to his principal, are not alone sufficient to sustain a verdict finding the agent guilty of embezzlement or converting to his own use the property of his principal.[5]

§ 824. **Intent an essential element.**—(1) In embezzlement an

[2] Epperson v. S. 22 Tex. App. 697, 3 S. W. 789.

[3] McElroy v. P. 202 Ill. 477, 66 N. E. 1058.

[4] Dean v. S. 147 Ind. 221, 46 N. E. 528. There are two sections of the statute of Indiana on embezzlement, one where demand is essential to be made and the other where it is not essential.

[5] S. v. Culver (Neb.), 97 N. W. 1017.

intent to feloniously appropriate the property at the time of the appropriation is essential; and if the appropriation is made upon the belief, honestly entertained by the accused that he has lawful title or right to appropriate it, the act is not criminal.[6]

(2) An essential element in the crime charged in this case is a felonious intent, and before you can convict the defendant you must find from the evidence that he intended to convert to his own use the money of the prosecuting witness, and to cheat, wrong and defraud him.[7]

(3) If you believe from the evidence before you that it was the intention of the defendant to act in good faith towards C, as his agent for the sale of the organ in question and carry out his alleged agreement, and that he, after the sale of the organ, conceived for the first time the intention to appropriate the proceeds of the sale to his own use or benefit, he would not be guilty of embezzling the said organ.[8]

§ 825. **Intent, knowledge of bank's condition.**—It is no offense for an officer of a bank to assent to the receipt of a deposit by such bank when the same is in failing circumstances, if at the time of receiving such deposit, the officer did not at the time know it was in failing circumstances, but in taking into consideration the question as to whether or not the bank in question was in failing circumstances on the tenth day of July, 1893, and as to whether or not the defendant had knowledge on that day of its condition, you may consider all the facts and circumstances in evidence before you.[9]

§ 826. **Bank receiving deposits by officer or others.**—(1) If you shall believe from the evidence that the defendant, at the county of Jackson, in this state, at any time within three years next before the thirtieth day of ——, was the president of the bank mentioned, and that said bank was then and there a corporation and doing business as a banking institution in said county and state, and did then and there unlawfully and feloniously assent to the taking and receiving on deposit in said banking institu-

[6] Beaty v. S. 82 Ind. 232.
[7] S. v. Eastman, 60 Kas. 557, 57 Pac. 109.
[8] Epperson v. S. 22 Tex. App. 697, 3 S. W. 789.
[9] S. v. Darrah, 152 Mo. 529, 54 S. W. 226.

tion the money of the witness, V, to the amount of three hundred dollars or more, and that said banking institution was then and there in failing circumstances, and that the defendant was then and there the president of said banking institution doing business as such, and that the defendant had knowledge at the time when such deposit was received that said banking institution was in failing circumstances, you will find the defendant guilty and fix his punishment at imprisonment in the penitentiary for any time not less than two years and not more than five years.[10]

(2) If the jury shall believe from the evidence that on the — day of ——, the witness, V, deposited in the bank in question, a banking institution doing business in this state, at the county of Jackson, the sum of three hundred dollars or any part thereof to the value of thirty dollars or more lawful money of the United States, of the money and property of the witness, V, and shall further believe from the evidence that the said deposit was not taken and received by the defendant himself, but was taken and received by some other person, but that such person was then and there in the employ of the said bank and acting under the direction and control of the defendant in said employment, and that such other person had general power and authority from the defendant to receive deposits of money into said bank, and that said bank was then and there in failing circumstances, and the defendant had knowledge that said bank was then and there in failing circumstances, they will find the defendant guilty as charged.[11]

§ 827. **President borrowing from his bank—Evidence.**—It is not of itself a crime for the president of a bank to borrow money from the bank of which he is president, and you may consider the fact that the defendant borrowed money from the bank in question, if you find he was president of the same and did borrow money from it, in determining the condition of the bank on the tenth day of July, 1893, and for no other purpose.[12]

§ 828. **Condition of bank, value of assets, liabilities.**—(1) A banking institution is in failing circumstances when it is unable

[10] S. v. Darrah, 152 Mo. 527, 54 S. W. 226.

[11] S. v. Darrah, 152 Mo. 527, 54 S. W. 226.

[12] S. v. Darrah, 152 Mo. 529, 54 S. W. 226.

to meet the demands of its depositors in the usual and ordinary course of business, and this is true even though you shall believe that there was at the time a stringency in the money market.[13]

(2) In determining the condition of the said bank on the tenth day of July, 1893, you should consider the reasonable market value of the assets of the bank on hand as compared to its liabilities on that day; all consideration of the condition of the bank is confined to the tenth day of July, 1893, but you may consider any evidence that may be before you showing its condition immediately before that day, if there is any such, to aid you in determining its condition on that day.[14]

(3) In determining the question of whether or not the said bank was in failing circumstances on the tenth day of July, 1893, you should consider the liabilities of the bank and the reasonable market value of the assets of the bank on that day regardless of any change, if any, or additional security, if any, which may have been given since that day. If you shall find from the evidence that any part of the assets of said bank have been proven to have a market value, then you should give such assets such intrinsic value as may have been shown by the evidence in the case, and if there be any of said assets, to wit, stocks, bonds or negotiable paper, that have not in your opinion, from the evidence, been shown to have a market value nor an intrinsic value, then such assets are presumed to be worth their face value. This will have no application to such assets as may have been shown by the evidence to have no value at all, provided there is such evidence as to any of the assets of said bank.[15]

(4) In considering the condition of the bank on the tenth day of July, 1893, you will not take into account the three hundred thousand dollars of capital stock as a liability.[16]

(5) The court instructs you that in determining the value of any of the assets of the said bank on the tenth day of July, 1893, as shown on this trial, the testimony of expert witnesses, who

[13] S. v. Darrah, 152 Mo. 528, 54 S. W. 226.

[14] S. v. Darrah, 152 Mo. 528, 54 S. W. 226.

[15] S. v. Darrah, 152 Mo. 531, 54 S. W. 226.

[16] S. v. Darrah, 152 Mo. 528, 54 S. W. 226.

have testified before you, if deemed by you unreasonable, may be disregarded.[17]

§ 829. **Failure of bank as prima facie evidence.**—Although by the statute the failure of the bank in question is made prima facie evidence of the knowledge on the part of the defendant that the same was in failing circumstances on the tenth day of July, 1893, yet the burden of proving the state's case is not really changed. The law enables the state to make a prima facie case by proof of the assenting to the creation of said indebtedness and the reception of the money into the bank, but the defendant can show the condition of the bank and the circumstances attending the failure and any facts tending to exonerate him from criminal liability; and then, on the whole case, the burden still rests on the state to establish defendant's guilt beyond a reasonable doubt. The presumption of innocence with which defendant is clothed never shifts, but rests with him throughout the case, notwithstanding a prima facie case may have been made out by the state.[18]

False Pretense.

§ 830. **Definition and elements.**—(1) A false pretense has been defined to be such a fraudulent representation of a fact, past or existing, by a person who knows it to be untrue as is adapted to induce the person to whom it is made to part with something of value.[19]

(2) To make out a complete case of false pretense, the following essential facts must be established by the evidence beyond a reasonable doubt: first, the intent to defraud some particular person or people generally; second, an actual fraud committed; third, the false pretense; and fourth, that the fraud resulted from the employment of the false pretense.[20]

§ 831. **Offense committed by acts, symbols, words.**—A false pretense may consist of any act, word, symbol, or token calculated to deceive another, and knowingly and designedly employed by any person with intent to defraud another of money or other personal property. And if you shall be satisfied from the evi-

[17] S. v. Darrah, 152 Mo. 532, 54 S. W. 226.

[18] S. v. Darrah, 152 Mo. 522, 533, 54 S. W. 226.

[19] S. v. Lynn (Del.), 51 Atl. 882; Jackson v. P. 126 Ill. 139, 18 N. E. 286; Hughes Cr. Law, § 579.

[20] Hughes Cr. Law, § 579.

dence that the defendant made such false pretense as charged in the indictment, with the intent to cheat and defraud as defined in these instructions, then you should ascertain whether the defendant did by such false pretense actually obtain the money of R, the receiver of taxes and treasurer aforesaid.[21]

§ 832. **Defrauding tax collector—Essential elements.**—In order to convict under the indictment, the state must prove to your satisfaction beyond a reasonable doubt: first, that the defendant knowingly made a false pretense as charged in the indictment; second, that he made such false pretense with the intent to cheat and defraud R, the receiver of taxes and county treasurer; third, that by such false pretense he actually did cheat and defraud the said R, the receiver of taxes and county treasurer, and did obtain from him thereby, in coin or paper money, or both, lawful money, then the property of said R, receiver of taxes and county treasurer aforesaid.[22]

[21] S. v. Lynn (Del.), 51 Atl. 883. [22] S. v. Lynn (Del.), 51 Atl. 882.

CHAPTER LX.

OTHER SPECIFIC OFFENSES.

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§ 834. **Common law marriage, what constitutes.**—A simple agreement between one man and one woman, who may lawfully contract that they will take each other as husband and wife thenceforth, and that they will sustain this relation thenceforth so long as they both shall live, with the mutual understanding that neither one nor both can rescind the contract or destroy the relation followed by cohabitation; when they do this they are married. And in such case their marriage is just as valid as though a chime of bells had played a wedding march and a half dozen bishops and clergymen assisted at the celebration before a thousand people.[2]

Bastardy.

§ 835. **Facts to be determined by the jury.**—You have heard the statements of the relatrix and the evidence tending to show that the defendant had opportunities for intercourse with her; and you have also heard the evidence of the witnesses tending to show that persons other than the defendant had intercourse with her about the time the child was begotten; you may consider these circumstances in determining whether the defendant is the father of the child.[3]

[1] S. v. Crowner, 56 Mo. 149. Rape and robbery—For instructions on these offenses see "Assault," Chapter LV.

[2] S. v. Miller, 12 Ohio C. C. 66; Teter v. Teter, 101 Ind. 129.

[3] Mobley v. S. 83 Ind. 94.

§ 836. **Public rumor is not evidence.**—In determining the question whether the defendant is the father of the child in question, you should not regard or consider what public rumor was before the time of the begetting of the child concerning the intimacy of the defendant or other person with the relatrix, but should look soley to the evidence, and be governed by it as to the fact of the begetting of the child.[4]

Cruelty to Animals.

§ 837. **Killing stock to preserve crops.**—If you believe from the evidence that the defendant killed one or more of the hogs of R. by shooting them, and did not cruelly beat, abuse, torture, or purposely injure the hogs, but killed them in the manner above stated, then you should find for the defendant, if you should believe from the evidence that the defendant killed them in order to save his crop.[5]

§ 838. **Intentionally overdriving horse.**—The commonwealth must prove that the defendant overdrove the horse knowingly, and intentionally; that the defendant, like all other men, was presumed to know what he did, and to intend the natural and necessary results of his acts; that if, in the proper exercise of his own judgment, he thought he was not overdriving the horse, he must be acquitted; and that upon these instructions the jury might come to the conclusion that it was a question of fact to be determined by the result of the testimony introduced by the commonwealth and by the defense.[6]

Disorderly House.

§ 839. **What constitutes disorderly house.**—If you find from the evidence that the defendant kept a bar-room and dance hall, with music, for the purpose and with the intent of bringing to-

[4] Saint v. S. 68 Ind. 129.
[5] Stephens v. S. 65 Miss. 330, 3 So. 458; Hunt v. S. 3 Ind. App. 383.
[6] Com. v. Wood, 111 Mass. 409.

gether and entertaining prostitutes and men desirous of their company, and that such persons habitually assembled there to drink and dance together, then you may find said establishment a disorderly house, within the meaning of the law, even though you may also believe that the house was quietly kept, and no conspicuous improprieties were permitted inside. The jury being the judges of the law as well as facts, this charge is to be understood as advisory only of what the law is.[7]

Forgery.

§ 840. **Forgery defined.**—Forgery is the fraudulent makng or alteration of a writing to the prejudice of another's rights, with intent to cheat and defraud.[8]

§ 841. **Alteration of instrument is forgery.**—Any material alteration, in part, of a genuine instrument, whereby a new operation is given it to the prejudice of the rights of another, is a forgery of the whole instrument, if done with intent to defraud.[9]

§ 842. **Aiding and abetting another.**—It is not necessary, in order to sustain a conviction, to show that the defendant actually participated in making, uttering, or passing the instrument alleged to have been forged. If you believe from the evidence before you, beyond a reasonable doubt, that he aided, abetted or assisted in such forgery, with intent to cheat and defraud, you should find the defendant guilty.[10]

§ 843. **Uttering or publishing forged document.**—You are instructed that whoever shall, with intent to injure and defraud any one, knowingly utters or publishes as true and genuine any

[7] Beard v. S. 71 Md. 275, 17 Atl. 1044.

[8] Hughes Cr. Law, §§ 896, 897, citing: 4 Blackstone Comm. 247; U. S. v. Long, 30 Fed. 678; S. v. Flye, 26 Me. 312; 3 Greenleaf Ev. (Redf. ed.), § 103; S. v. Rose, 70 Minn. 403, 73 N. W. 177; Underhill Cr. Ev. § 419.

[9] Hughes Cr. Law, § 897, citing: S. v. Wood, 20 Iowa, 541; S. v. Kattlemann, 35 Mo. 105; Owen v. Brown, 70 Vt. 521, 41 Atl. 1025; P. v. Underhill, 26 N. Y. S. 1030, 75 Hun, 329, 142 N. Y. 38, 36 N. E. 1049; Com. v. Hyde, 94 Ky. 517, 15 Ky. L. R. 264 23 S. W. 195, and other cases.

[10] Hughes Cr. Law, § 904, citing: Anson v. P. 148 Ill. 502, 35 N. E. 145; 3 Greenleaf Ev. (Redf. Ed.), 104.

false or forged check, is guilty of a crime, and shall be punished as prescribed by law.[11]

§ 844. **Intent to defraud essential.**—If you shall find from the evidence in the case, beyond a reasonable doubt, that the defendant did knowingly utter and publish the check set forth in the indictment as true and genuine, still, before you can convict him, you must further find that he did so utter and publish it with the intent to injure and defraud another. And in this respect you may consider whether he had an intent to injure or defraud either the person to whom he gave the check or W. And if you shall find from the evidence, beyond a reasonable doubt, that he uttered and passed the check upon J, with intent to deceive him, and did obtain money on it, and that J, relying upon the check, presented it to the bank for payment, then you may infer from that act an intention to injure the said J or W; and if you shall find from all the evidence in the case, beyond a reasonable doubt, that the check was so uttered with the intent to obtain money upon, you should find that he did utter and publish the said check with an intent to injure or defraud.[12]

§ 845. **Forging a deed—Venue.**—If you find, and believe from the evidence, that the deed read in evidence and described in the information, or any part thereof (not including the acknowledgment of the same), was falsely made, and forged with intent to cheat and defraud as defined in other instructions, and that the defendant had possession of the same in S county, Missouri, and that he made claim to the land therein described, or any part thereof, by virtue of and under said deed, then these facts constitute evidence that he committed the forgery of the same, or caused the same to be forged, and that he committed said forgery in S county and state of Missouri; and unless he explains or accounts for his possession thereof in a manner consistent with his innocence, then these facts are sufficient to warrant the jury in finding him guilty of forgery as charged in the information.[13]

[11] Stockslager v. U. S. 116 Fed. (C. C.), 599.

[12] Stockslager v. U. S. 116 Fed. (C. C.), 599.

[13] S. v. Payscher (Mo.), 77 S. W. 841. (The facts recited in the instruction standing unexplained raise the presumption that the defendant forged the deed or caused it to be forged in S county.)

Gaming.

§ 846. **Gaming defined.**—Gaming is an unlawful agreement between two or more persons to risk money or other property on a contest or chance of any kind where one will be gainer and the other loser.[14]

§ 847. **Betting on game of cards.**—If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant played at a game of cards with other persons, for money, in manner and form as charged in the indictment, at or about the time and place therein stated, under an agreement or understanding that the winner of the game should take the money put up or staked by each of them on said game, then you should find the defendant guilty.[15]

§ 848. **Betting on game of billiards.**—The playing of billiards, pool, or other games played upon a billiard table, when there is a wager of the money-rent of the table between the parties playing, or when the parties play such game for a wager of chips, checks, or other things of value, in either case the playing of such game for such wager is gambling within the meaning of the law.[16]

§ 849. **Doing forbidden act in a public place.**—A shop or other building is the private property of its owner unless he, of his own volition, so uses it as to give the public a right to enter it at will; and every one owning such building may, by himself or agent, invite any number of his neighbors into his house or shop, and such persons may assemble there pursuant to such invitation, and such assembling would not make the place a public place in the legal sense of that term.[17]

Criminal Libel.

§ 850. **Motives prompting communication.**—The burden is on the state to show affirmatively that the communication was made with malice; that is to say, not from a sense of duty, but from a

[14] Hughes Cr. Law, § 2193, citing: Eubanks v. S. 3 Heisk. (Tenn.), 488; Portis v. S. 27 Ark. 360.

[15] Hughes' Cr. Law, § 2193.

[16] Hamilton v. S. 75 Ind. 593.

[17] Lorimer v. S. 76 Ind. 497; S. v. Tincher, 21 Ind. App. 142, 51 N. E. 943.

dishonest motive. If the defendant honestly believed it to be his duty to make the communication, and did so under a sense of duty only, he is not guilty. If, on the other hand, his motives were not good, if the communication was not made for a justifiable end, but from malice, to gratify a feeling of revenge for supposed injury, then he is not justified, and he should be found guilty.[18]

Perjury.

§ 851. **Evidence of one witness not sufficient.**—The evidence of one witness as to the falsity of the evidence upon which perjury is assigned is not sufficient to warrant a conviction. If there is but one witness testifying directly to the falsity of the evidence of one charged with perjury, there must be evidence of circumstances corroborating such falsifying testimony. There is no rule by which the exact weight of the corroborating circumstances requisite to warrant a conviction can be determined; and the jury must determine whether such corroborating circumstances are sufficient to justify a verdict of guilty. It is frequently stated that such corroborating circumstances must be equivalent to the positive or direct testimony of a witness. But such is not the rule of law.[19]

Public Nuisance.

§ 852. **Offensive smells from slaughter house.**—If the defendant maintained a slaughter house, as charged in the affidavit and information, and allowed and permitted offal of cattle and other animals slaughtered there, if any, to there accumulate as alleged in the information, and noisome and offensive smells were then and there emitted therefrom, which blended with noisome smells emanating from another slaughter house and a deposit of filth in the vicinity of said slaughter house, if any, and rendered the air impure or unhealthful, to the injury of persons named in the information, as therein alleged, the defendants would be liable, and the fact that such other slaughter house and deposit of filth ex-

[18] Haase v. S. 24 Vroom (N. J. L.) 40, 20 Atl. 751.

[19] Galloway v. S. 29 Ind. 442.

isted and exhaled such noisome smells, if such is the fact, would not justify or excuse the wrongful act of the defendants, if provable.[20]

§ 853. **Nuisance must affect whole community.**—To make the defendant's mill-dam and pond a public nuisance and the defendants indictable for maintaining the same, it must injuriously affect the public; that is, must affect the whole community. The fact that it injuriously affects individuals or families in a community is not sufficient to make the defendants guilty. They should be acquitted unless the jury are satisfied the whole community is so injuriously affected—not every family or person in the community, but the community generally.[21]

§ 854. **Mill-dam and pond producing offense.**—If the dam either directly causes or increases the inundation of the sand, mud and stagnant water which produces the malaria, or the water would, if unobstructed, carry off the sand, and the dam so obstructs as to prevent it doing so, the defendants would be guilty. The law will not undertake to apportion the liability for a public wrong. The question for the jury to decide, applying the principles of law, is, does the dam and pond produce the nuisance? If so, the defendants are guilty, otherwise they should be acquitted.[22]

§ 855. **Pond producing malaria, odors.**—The erection of the dam is not in itself wrongful, nor is the mill-pond in itself a nuisance; if, however, by reason of natural causes, such as decaying vegetation which has grown or been brought into the pond by the stream or its natural tributaries, or changes in the topography of the land adjacent to the creek from the operation of natural laws, the pond produces, or contributes to the production of malaria or noxious, unhealthy odors, to that extent which injures the health or comfort of the community in general, it would thereby become a nuisance, and the defendants indictable for maintaining it.[23]

[20] Dennis v. S. 91 Ind. 292.

[21] S. v. Holman, 104 N. Car. 864, 10 S. E. 758. Under the statutes of Indiana a public nuisance erected or maintained "to the injury of any part of the citizens of this state" is indictable. Paragon Paper Co. v. S. 19 Ind. App. 328.

[22] S. v. Holman, 104 N. Car. 866. 10 S. E. 758.

[23] S. v. Holman, 104 N. Car. 866, 10 S. E. 758.

The defendants are liable only for such results as flow directly, naturally and proximately from the pond and dam. Therefore, if you find that the pond and dam are the cause of the nuisance, you should convict the defendants; but if other causes or agencies, to which the defendants have not contributed, and which did not arise from their agency, so affected the pond and dam as to produce the cause of the sickness, then such sickness would be attributed by law to such agencies, and not to the pond or dam, and you should acquit the defendants.[24]

§ 856. **Offense caused by other means.**—If the evidence should satisfy the jury that the whole community had been injuriously affected, yet defendants would not be guilty unless it was further found from the evidence that such injury was produced, directly and proximately, by defendants' dam and pond, and by no other cause.[25]

§ 857. **Nuisance caused by others, not defendant.**—If other persons, not under the control of the defendants, plow or bring into the pond or the lands adjacent thereto, substances which decay and produce malaria; or if such persons cut ditches into the stream above the pond, thereby bringing sand and mud into the creek; or if, having cut such ditches, failed to keep them open, permitting them to become choked and filled up, thereby causing malaria, such result would be attributed to such persons and agencies and not to the pond, and defendants should be acquitted.[26]

Highway Violations.

§ 858. **Public road—How established, user, dedication.**—(1) A public road may be properly established by user, and if the county attempted to establish the road in question, and the proceedings were void, yet if the said road, or the part thereof upon which the bridge was located, was used as a public road, with the knowledge of the defendant, for the term of ten years just prior

[24] S. v. Holman, 104 N. Car, 865, 10 S. E. 758.

[25] S. v. Holman, 104 N. Car. 865, 10 S. E. 758. But see Dennis v. S. 91 Ind. 291, note 20, this chapter.

[26] S. v. Holman, 104 N. Car. 865, 10 S. E. 758.

to the alleged destruction of said bridge, then the said road was properly established.[27]

(2) You are instructed that there can be no valid dedication to the public of such right of way as is claimed unless it is proved that the owner of the land intended a dedication of such way to the public.[28]

(3) The plaintiff is not bound to rely upon the record alone for the road, but may rely on any facts that may constitute a road, and the road may exist part by record and part by dedication; and if Biggs, while he was the owner of the land through which the road runs at the point of alleged obstruction, dedicated a portion of the road in question in exchange for a portion of the laid-out road, of any way laid out, then the portion so dedicated will be a valid road.[29]

§ 859. Vacating public road—How.—The county commissioners had no authority to vacate the road in question unless there was first filed in the proper office the petition required by law, properly published or posted, and any order they might make without first filing the petition and the publication or posting of the required notice would not vacate said road.[30]

§ 860. Malicious destruction of bridge on highway.—(1) Before you can convict you must be satisfied from the evidence beyond a reasonable doubt of the truth of the following propositions: first, that the bridge in question was a public bridge; second, that the road upon which it was placed was a public road at the time of the alleged destruction; third, that the said road was properly established by the proper legal authorities, or was a public road by user, and was such public road at the time of the alleged destruction; fourth, that the defendant willfully and unlawfully and maliciously did cut and destroy the said bridge with intent to injure the same.[31]

(2) If the portion of the road upon which the said bridge alleged to have been destroyed was placed had not been totally abandoned as a road for a period of five years next prior to the destruction charged against the defendant, then you may find that

[27] O'Dea v. S. 16 Neb. 243, 20 N. W. 299. See, Wragg v. Penn. Tp. 94 Ill. 24; Daniels v. P. 21 Ill. 438, several instructions held proper.

[28] Ross v. Thompson, 78 Ind. 97.

[29] Town of Havana v. Biggs, 58 Ill. 485.

[30] O'Dea v. S. 16 Neb. 243, 20 N. W. 299.

[31] O'Dea v. S. 16 Neb. 242, 20 N. W. 299.

said part of the road was a public road, provided you further find that the said road was in the original instance properly established, or has been in public use for a period of ten years next prior to the alleged destruction of said bridge.[32]

(3) If you shall be satisfied beyond a reasonable doubt that the portion of the road on which the bridge was placed had been totally abandoned as a public road for a period of five years next prior to the establishing and placing thereon the bridge in question, then it ceased to be a public road and no conviction can be had.[33]

(4) You may, in endeavoring to learn whether or not the defendant knew the bridge was a public one and located upon a properly established public road, consider that the defendant received damages from the county of W for the land taken to constitute the part of the road upon which the bridge was located.[34]

Sunday Violations.

§ 861. Operating machinery on Sunday.—"The court instructs the jury that the burden of proof is on the state in this case to establish beyond a reasonable doubt the fact that the defendant pumped or operated certain oil well or wells in R county on a Sabbath-day within one year prior to the finding of this indictment; and further, that the burden of proof is on the state to prove that such pumping or operating was not a work of necessity or charity."[35]

[32] O'Dea v. S. 16 Neb. 242, 20 N. W. 299.

[33] O'Dea v. S. 16 Neb. 242, 20 N. W. 299.

[34] O'Dea v. S. 16 Neb. 243, 20 N. W. 299.

[35] S. v. McBee, 52 W. Va. 260, 43 S. E. 121.

CHAPTER LXI.

MISCELLANEOUS INSTRUCTIONS.

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Contracts.

§ 862. **Extending time of payment—Evidence.**—The payment of interest in advance is not of itself conclusive evidence of a contract to extend the time of payment for the term for which interest may have been thus paid, but it is a strong circumstance to be looked to by the jury in determining the existence of the contract claimed.[1]

Converting property.

§ 863. **Damages for property appropriated.**—The measure of damages is the value of the logs at the time they were converted to the defendant's use, without any deduction for labor rendered or bestowed upon them by the wrongdoer.[2]

Corporations.

§ 864. **Proving existence of corporation by user.**—It is not necessary for the state to prove the articles of association or charter of the railway company; it is sufficient to prove by reputation that there was at the time when the crime is alleged to have been committed a corporation known by that name, operating such road, and carrying goods, stock and passengers for hire in its cars running along or upon said company's road. A de facto existence of the corporation is only necessary to be shown.[3]

Customs.

§ 865. **Customs and rules of board of trade.**—If the jury believe from the evidence that the plaintiff went upon the board of trade and made contracts and traded with the members, he is bound by the rules, regulations and customs of said board the same as if he had been a member thereof, and in that case will not be permitted to plead his ignorance of said rules, regulations and customs as a reason for not being bound by them.[4]

[1] Gard v. Neff, 39 Ohio St. 607.
[2] Everson v. Seller, 105 Ind. 270, 4 N. E. 854.
[3] Burke v. S. 34 Ohio St. 79.
[4] Chicago, P. & P. Co. v. Tilton, 87 Ill. 553.

Ejectment.

§ 866. Plaintiff must recover on strength of his own title.—(1) In an action of ejectment the general rule is that the plaintiff must recover upon the strength of his own title and not upon the weakness of the defendant's title, for the reason that the defendant is not required to give up possession until the true owner demands it, and the right to show in defense a subsisting outstanding title rests upon the same principle. So if the title of the plaintiff, D, to the three thousand acres of land claimed by him, became forfeited to the state for any five consecutive years before bringing this suit, for the non-payment of taxes thereon, or for the failure of the said D, or any one under whom he claims to have said lands entered on the land books of any county in which part thereof is situated where they are located for the purpose of taxation, then the said plaintiff cannot recover in this action, and the jury must find for the defendant.[5]

(2) Although the jury may believe from the evidence that the land in controversy is covered by the deeds under which the plaintiff claims, yet if they further believe from the evidence that the defendants and those under whom they claim have been in the honest, peaceable, continuous and adverse possession of said land, paying taxes on the same, under color of title, for fifteen years prior to the institution of this suit, they must find for the defendants.[6]

Evidence.

§ 867. Copy instead of original used as evidence.—Counsel for the plaintiff have agreed that the accounts offered in evidence by the defendant and taken from his books, shall have the same effect as though the books themselves had been duly proved and produced in court; but unless the jury believe from the evidence that the books from which said accounts were taken were books of original entry, then the same are not evidence in favor of the defendant on this trial.[7]

[5] Davis v. Living, 50 W. Va. 432, 40 S. E. 365.

[6] Rensens v. Lawson, 91 Va. 230, 21 S. E. 347.

[7] Shrewsbury v. Tufts, 41 W. Va. 217, 23 S. E. 692.

Estoppel.

§ 868. **Disclaiming interest in property.**—(1) Where one person by his acts or declarations made deliberately and with knowledge induces another to believe certain facts to exist, and such other person rightfully acts on the belief so induced and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled. This definition embraces all the essential elements of an estoppel. It will be your duty to examine the evidence and ascertain whether all these elements are proved in this case.[9]

(2) If before P had obtained his deed from G and B for the land in contest, and before paying for the same, he went to R and asked him if he had any claim on such land, and he told him he did not claim any land on the south side of S, and he was induced to take the deed and pay for said land by reason of said statement by R, then R is barred from now setting up claim to said land against P's vendee, the plaintiff.[10]

(3) To constitute an equitable estoppel of the rights of the plaintiffs in this action it must be shown that the plaintiffs were apprised of each sale to innocent vendees, before it was made, so that they might have had an opportunity to inform the purchaser of their interest in the property sold.[11]

Fences.

§ 869. **Notice of fence viewers to parties interested.**—(1) It was not necessary that the notice of the fence viewers to plaintiff and defendant, of the time they would examine the fence, should have been given for any definite time or number of days before such examination. The law required due notice to be given. By the term due notice, is meant reasonable notice; and the notice to the defendant was due and reasonable, if after the

[9] Pennsylvania Co. v. Platt 47 Ohio St. 382, 25 N. E. 1028.

[10] Ratcliff v. Bellfonte Iron Works Co. 87 Ky. 564.

[11] Cox v. Matthews, 17 Ind. 367.

notice was given he had a reasonable time to go from the place where it was served and be at the examination of the fence at the time specified in the notice.[12]

(2) It was not necessary to entitle the plaintiff to recover that the certificate of the fence viewers, of the value of the fence, or a copy thereof, should have been served upon the defendant, or presented to him before, or at the time of, demand of the sum certified.[13]

Guardian.

§ 870. **Estimating value of guardian's services.**—(1) In determining the amount you will allow G for his services as guardian, in the event you find for the plaintiff, you should take into consideration the amount of interest he has charged himself with, the rate of interest he could reasonably have loaned said funds at from time to time, and his allowance for services by the court up to the time of his death. A guardian who loans the funds of his ward and collects but a small rate of interest thereon, ought not to have for his services as much compensation as one who loans and collects for his ward a good rate of interest.[14]

Handwriting, Proving.

§ 871. **Knowledge from seeing person write.**—(1) Although a witness may testify that he has seen the defendant write, yet this is not proof of the execution of the instrument of writing purporting to have been executed by the defendant, unless the witness is able to distinguish the signature to the instrument as that of the defendant, according to the belief of the witness founded on his previous knowledge of the hand-writing of the defendant.[15]

§ 872. **Comparison of signatures improper.**—(1) The proof of the signature of the defendant to the note in question cannot be made by comparison with other signatures, but the burden of

[12] Tubbs v. Ogden, 46 Iowa, 137.
[13] Tubbs v. Ogden, 46 Iowa, 137.
[14] Richards v. S. 55 Ind. 383.
[15] Putnam v. Wadley, 40 Ill. 346.

proof of his hand-writing must be made by witnesses who have seen the defendant write and are familiar with his signature, or who have seen letters or other documents which the defendant had, in the course of his business, recognized or admitted to be his own hand-writing.[16]

Homestead.

§ 873. **Abandonment of homestead.**—(1) If you believe from the evidence that the plaintiff abondoned his wife and left her to shift for herself, and that he failed to support his wife, and that he voluntariy and without cause left the premises used and occupied as a homestead, and that he absented himself from said house and continued said abandonment up to the death of his said wife, then, and in that event, you will find your verdict in favor of the defendant.[17]

(2) If you believe from the evidence that defendant had abandoned the lot in controversy for home use and appropriated it for other than home purposes, then you will find for the plaintiff, unless you believe that at the time of the levy the defendant had reappropriated said lot for homestead purposes and was using and occupying the same with the intention of permanently using and occupying the same as a home, then, in that event, you will find for defendant. If you believe from the evidence that defendant had abandoned the lot in controversy for the purpose of a home, and that at the time of the levy he was using and occupying it as a sham and pretext to shield it from his creditors, then you will find for the plaintiff.[18]

Seduction.

§ 874. **Exemplary damages proper.**—If the jury believe from the evidence that the plaintiff is entitled to recover, and if they further believe that the plaintiff put his business into the hands

[16] Putnam v. Wadley, 40 Ill. 346.
[17] Hector v. Knox, 63 Tex. 615.
[18] Milburn Wagon Co. v. Kennedy, 75 Tex. 214, 13 S. W. 28.

of the defendant when he went to California in the year 1862, and that the defendant took advantage of his situation for the purpose of gaining access to and seducing the wife of the plaintiff; and if the jury further believe from the evidence that the defendant did, under these circumstances, commit adultery with the wife of the plaintiff, they have a right to give exemplary damages to the plaintiff not exceeding the amount claimed in the plaintiff's declaration.[19]

§ 875. **Damages for alienation of wife's affections.**—If you find for the plaintiff, then, in determining the question of damages, you may consider what injury, if any, the plaintiff has sustained to his domestic peace and happiness and alienation of the affections and the society of his wife, if you believe from the evidence that such alienation has been proved and wrong inflicted upon the plaintiff's honor.[20]

Selling Liquors.

§ 876. **Residence district—What is.**—(1) If a certain part of the city, large or small, is principally and chiefly used for residence purposes, families residing and having their homes therein, such part of the city would not become a business portion of the city merely because a grocery or other business was there carried on therein. The decided proponderance of residences and families residing therein determines the character of such portion of such city.[21]

(2) A family residing in a dwelling house as a family residence may furnish board and lodging to boarders who may occupy with the family a part of such residence, and such use of a dwelling house will not change its character from a residence to a business house.[22]

Trespass.

§ 877. **Damages for trespass.**—If the jury believe from the evidence that the defendant is guilty of the trespasses, or either

[19] Yundt v. Hartrunft, 41 Ill. 16.

[20] Ferguson v. Smethers, 70 Ind. 521.

[21] Shea v. City of Muncie, 148 Ind. 34, 46 N. E. 138.

[22] Shea v. City of Muncie, 148 Ind. 35, 46 N. E. 138 (ordinance forbidding sale of intoxicating liquors in residence district, construed by the court in this case).

of them, as charged in the plaintiff's declaration, then the jury will find for the plaintiff and assess her damages at such sum as is shown by the evidence, not exceeding five thousand dollars.[23]

Verdict.

§ 878. **Separate verdict where several defendants.**—Although the defendants are jointly informed against and tried, yet as to each you should make a separate finding, and if you should find both or either of them guilty, you should state in your verdict the finding and punishment of each separately.[24]

[23] Miller v. Balthasser, 78 Ill. 302.

[24] S. v. Peebles (Mo.), 77 S. W. 520.

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